TENAGA NASIONAL BHD v. BIG MAN MANAGEMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
S NANTHA BALAN JCA
MOHAMED ZAINI MAZLAN JCA
[CIVIL APPEAL NO: J-02(NCVC)(W)-1948-10-2019]
21 DECEMBER 2023

Abstract – *Once an impugned meter has been rectified and/or replaced with a new meter and the electricity supplier is no longer suffering losses, the electricity supplier cannot lawfully invoke the amended s. 38(1) of the Electricity Supply Act 1990 to disconnect electricity to the consumer's premises. If there is no evidence of meter tampering, no offence is committed and there is no lawful power to disconnect. There has to be a continuing offence to invoke the power of disconnection. However, a consumer still needs to prove its claim for damages in such cases of unlawful disconnection of electricity supply, and a failure to provide sufficient evidence of the losses it incurred or suffered, would lead to its claim being dismissed as the claims would not be legally sustainable or tenable.*

UTILITIES: *Electricity supply – Disconnection – Discovery of meter tampering at consumer's premises – Whether electricity supplier's action in rectifying tampered meters and later disconnecting supply lawful – Mayaria principle – Applicability – Electricity Supply Act 1990, s. 38(1)*

UTILITIES: *Electricity supply – Disconnection – Discovery of meter tampering at consumer's premises – Whether electricity supplier's action in rectifying tampered meters and later disconnecting supply lawful – Claim for damages – Whether consumer suffered losses – Whether permissible for exemplary damages to be granted for breach of contract claim – Whether claim for defamation and slander ought to be dismissed*

The respondent ('consumer') had two contracts with the appellant, Tenaga Nasional Berhad ('TNB') for the supply of electricity to the premises ('premises'). For purposes of the supply of electricity to the premises, the consumer was registered as TNB's consumer under two separate TNB accounts, meter A and meter B ('TNB meters'). A company, Ice Man Sdn Bhd ('Ice Man'), operated an ice-making factory at the premises. The consumer and Ice Man had a management contract pursuant to which the consumer handled all matters relating to the supply of electricity to the premises. The consumer only provided management services and were not involved in the operations of the ice-making factory. The issue which lay at

the heart of the case was the alleged tampering of the TNB meters which were situated in the (locked) meter room and located within the compound of the premises. It was alleged that only TNB had access to the meter room. The issue of no access to the meter room was a major part of the consumer's stand where they contended that they had no access to the meter room and as such, disavowed any knowledge of, or responsibility for any alleged tampering of the TNB meters. On the other hand, as far as TNB was concerned, upon inspection of the meter room on various dates, they discovered that the TNB meters had been tampered with. As such, TNB claimed that they were entitled to invoke their powers under s. 38(1) of the Electricity Supply Act 1990 ('Act'). TNB issued disconnection notices and disconnected the electricity supply to the premises on 2 July 2014 ('first disconnection') and only resumed the electricity supply on 1 October 2014. On 7 April 2015, the consumer received notices to disconnect electricity supply to the premises and on 8 April 2015, TNB disconnected the electricity supply to the premises ('second disconnection') and only resumed the electricity supply on 14 May 2015. The consumer's unyielding stand was that the disconnections were wrongful and eventually filed Suit 138 based on the following causes of action: (i) wrongful disconnection of electricity supply to the premises on 2 July 2014 and 8 April 2015; (ii) unlawful interference with the consumer's business; (iii) breach of statutory duty by TNB; (iv) defamation; and (v) trespass. The dispute may be crystallised as follows – whether it had been proven that there was meter tampering in respect of the TNB meters on the several occasions when TNB's technical officers had carried out inspections of the TNB meters, and whether TNB's action in rectifying the tampered meters on each of these occasions when tampering was discovered, and later disconnecting the supply of electricity on 2 July 2014 and 8 April 2015 on account of meter tampering (after the TNB meters had been rectified) was lawful in all the circumstances. In this regard, the pertinent legal question was whether the disconnection which was carried out based on a previously discovered tampered meter (and which was then rectified by TNB) was unlawful by reason of the application of the principle which was established per the Court of Appeal's decision in *Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor* (*'Mayaria'*) and upheld by the Federal Court, and subsequently endorsed and approved by the Federal Court in *Tenaga Nasional Bhd v. Chew Thai Kay & Anor* (*'Chew Thai Kay'*). At the High Court, the consumer raised a preliminary objection against TNB for raising evidence on the alleged tampering on the ground that TNB did not put forth to the consumer's relevant witnesses, the photographs and documentary evidence purportedly showing the alleged tampering, or what the TNB witnesses saw during the inspection, and cross-examine the consumer's witness on the same. The trial judge held that, *inter alia*: (i) in allowing the consumer's preliminary objection, it was unfair for TNB to raise evidence on the same without giving the opportunity to the consumer's witnesses to challenge, explain or contradict the same and therefore, the failure of TNB to put forth

those facts and cross-examine the consumer's witnesses amounted to an abandonment by TNB of this part of the defence; (ii) the alleged tampering had been rectified and was no longer extant and as such the first and second disconnections were unnecessary and illegal. As TNB had breached the electricity supply contract twice, the consumer was entitled to claim damages for the wrongful disconnections; (iii) TNB had conducted itself in ways which called for exemplary damages *ie*, intentionally punishing the consumer through the disconnection of electricity supply which was the livelihood of the business, awarding the consumer exemplary damages amounting to 25% of the special and general damages awarded; (iv) TNB's representative, DW19, had made statements which were defamatory in nature and/or with malicious intent to PW5, to the effect that the consumer had tampered and/or modified the meters. Based on the seriousness of the defamation, the consumer's reputation and standing, the consumer was awarded RM25,000 as general damages and RM25,000 as aggravated damages; and (v) TNB was liable for infringing the consumer's right as a registered electricity user by divulging the consumer's account detail to Sunshine Merchants Sdn Bhd (a company that had entered into a memorandum of understanding with Ice Man with the intention to take over Ice Man) without the consumer's consent. Thus, the sum of RM20,000 was awarded for general damages against TNB. Hence, this appeal by TNB. The issues that arose were, *inter alia*, (i) whether there was meter tampering; (ii) whether TNB fell foul of the *Mayaria* principle; (iii) whether exemplary damages could be allowed for a claim which was based on breach of contract; and (iv) whether defamation was proved.

Held (allowing appeal on liability and quantum)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) There was no attempt by TNB to discredit the consumer's witness on the issue of meter tampering. The consumer had fair notice of the fact that TNB had made discovery of meter tampering and all relevant documentary evidence in relation to the issue were given to the consumer ahead of the trial. There was no attempt and no ruling by the court to discredit or debunk the contemporaneous TNB documents in relation to meter tampering. There was no dispute that there was meter tampering, except that the perpetrator was unknown. Indeed, TNB never claimed that the consumer was responsible for meter tampering. And significantly, the consumer also did not tender any evidence to debunk TNB's subjective finding of meter tampering. TNB's evidence on meter tampering was unimpeachable as it was contemporaneous, credible, cogent and convincing. The preliminary objection was premised on the basis that TNB was blaming the consumer for the meter tampering which was not really the case that was presented at the trial. In the circumstances, the trial judge was plainly wrong in his decision

to uphold the preliminary objection and to hold that TNB had abandoned the issue of meter tampering. The preliminary objection was misguided and ought not to have been raised. (paras 86-89)

(2) The answer to the issue of repeated tampering was found in *Chew Thai Kay*, where the Federal Court reiterated the principle that the amendment to s. 38(1) of the Act had not altered the position of the law as decided in *Mayaria* when the Federal Court affirmed the decision of the Court of Appeal in that case. The Federal Court held that the position of the law now, as then, was that once the impugned meter had been rectified and/or replaced with a new meter and TNB no longer suffered losses, TNB could not lawfully invoke the amended s. 38(1) to disconnect electricity to the consumer's premises. It was clear and plain from a reading of s. 38(1) that only on a finding of evidence of meter tampering was TNB empowered to disconnect supply. If there was no evidence of meter tampering, no offence was committed and there was no lawful power to disconnect. (para 91)

(3) Parliament intended for the subsequent action (disconnection) to be taken presently, urgently, and expeditiously (*ie*, immediately upon discovery of tampering) and not in the future (*ie*, long after discovery of any tampering, much less after the tampered meter had been rectified and/or replaced). Only evidence of meter tampering justified disconnection. Once the impugned meter had been rectified, there was no longer any issue of meter tampering and thus the offence under s. 37(1) of the Act no longer existed. There had to be a continuing offence to invoke the power of disconnection. (para 92)

(4) It was clear from the judgment of the Federal Court in *Chew Thai Kay* that 'where there was a further discovery of meter tampering after the previous tampering had been rectified, TNB could immediately exercise the power of disconnection under s. 38(1) provided that it took no step to all over again rectify the subsequent tampering'. This passage from the apex court was decisive on the issue of repeated meter tampering. In the upshot, it was not a question of exception to *Mayaria.* Rather, *Mayaria* still applied and each time the tampering is repeated, it becomes necessary for TNB to comply with s. 38(1) of the Act and to then issue the requisite notice of disconnection. If TNB rectified the tampered meter, then it fell into the ambit of the *Mayaria* principle and could not thereafter invoke the statutory power of disconnection under s. 38(1) of the Act. As such, the disconnections were wrongful and TNB was liable for damages. (para 93)

(5) There was no evidence whatsoever of the purported damages that the consumer had incurred from paying Ice Man. There was no evidence of the losses suffered by Ice Man which the consumer was liable to compensate. There was in fact no evidence that the consumer had ever used generators (and diesel) for purposes of the ice production business

A at the premises. The consumer only provided management services and were not running an ice factory. There was also no evidence whatsoever of the consumer's business sales during the period of electricity disconnection to justify the purported rental and/or purchase of the generators. (paras 98-100)

B **(6)** It was not permissible for exemplary damages to be granted for a breach of contract claim of this type. The trial judge had awarded exemplary damages based on 25% of the special damages which was quite unprecedented. Special damages were out of pocket expenses or claims which were quantifiable and which had to be specifically pleaded and C strictly proven. Special damages were not assessed. The consumer had not proven their special damages claim. There was no jurisprudential support for exemplary damages to be granted as a percentage of special damages. In any event, as a matter of law, exemplary damages were not claimable in a breach of contract claim. (paras 104 & 105)

D **(7)** As to the claim for defamation, the person to whom the impugned words (PW5) were alleged to have been said had clearly testified that the words she used were her words and not that of DW19. In light of PW5's evidence, the claim for slander could not stand as it had not been proven that the impugned words were uttered by DW19. The claim for E defamation ought to have been dismissed. In any event, it was necessary to keep in mind that the impugned words, if they were indeed uttered, were only said to one person. The extent of publication was *de minimi*s at best and the consumer would have been entitled to a meagre amount of damages. Thus, this court could not see how the trial judge could have F granted aggravated damages when there was no claim for this head of damages. Thus, TNB had failed on the *Mayaria* issue but had succeeded on all other issues both on liability and quantum. (paras 110 & 113)

Case(s) referred to:

A Balakrishnan & Ors v. Nirumalan K Pillay & Ors [1999] 3 SLR 22 ***(refd)***

G *Big Man Management Sdn Bhd v. Tenaga Nasional Bhd [2020] 8 CLJ 27 HC* ***(refd)***

Browne v. Dunn (1893) 6 R 67 ***(refd)***

Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***

H *Douglas Ding Jangan & Ors v. Kerajaan Negeri Sarawak & Ors [2021] 7 CLJ 653 FC* ***(refd)***

Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors [1999] 8 CLJ 131 HC ***(refd)***

Kuan Pek Seng v. Robert Doran & Ors And Other Appeals [2012] CLJU 775; [2012] 1 LNS 775 CA ***(refd)***

I *Liza Ismail v. PP [1997] 2 SLR 454* ***(refd)***

Markem Corporation & Anor v. Zipher Ltd [2005] EWCA Civ 267 ***(refd)***

Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2) [2009] 8 CLJ 130 HC ***(refd)***

Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 3 CLJ 825 HC ***(refd)***
National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Bhd [2023] 10 CLJ 430 CA ***(refd)***
Sunlite Textile Sdn Bhd v. Motilal Realty Sdn Bhd (No 2) [2007] CLJU 187; [2007] 1 LNS 187 HC ***(refd)***
Tan Ah Kow & Anor v. Tan Chaui En [2018] 2 CLJ 610 CA ***(refd)***
Tenaga Nasional Bhd v. Chew Thai Kay & Anor [2022] 2 CLJ 333 FC ***(refd)***
Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***
Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(refd)***
Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor [2019] 8 CLJ 786 CA ***(refd)***
Thomas Thomas v. Tenaga Nasional Bhd [2017] 4 CLJ 340 CA ***(refd)***
Xin Guan Premier Sdn Bhd v. Tenaga Nasional Bhd [2016] 1 CLJ 318 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69
Electricity Supply Act 1990, ss. 37(1), (3), (14), 38(1), (3), (4), (5)

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[Editor's note: For the High Court judgment, please see Big Man Management Sdn Bhd v. Tenaga Nasional Bhd [2020] 8 CLJ 27 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal by Tenaga Nasional Berhad ("TNB") against the decision of the learned judge of the High Court at Johor Bahru ("the learned judge") (after a full trial) delivered on 30 September 2019. By the said decision, the learned judge allowed all but one of the reliefs sought by Big Man Management Sdn Bhd, the plaintiff in Johor Bahru High Court Suit No. JA-22NCvC-138-07/2016, against TNB. The judgment of the High Court which has given rise to the present appeal is reported as *Big Man Management Sdn Bhd v. Tenaga Nasional Bhd* [2020] 8 CLJ 27; [2020] 11 MLJ 472. The suit was originally filed on 29 February 2016 in the Kuala Lumpur High Court and registered as Suit No. WA-22NCVC-116-02/2016 ("Suit 116"). By an order dated 28 June 2016, Suit 116 was transferred to the Johore Bharu High Court and re-registered there as Suit No. JA-22NCvC-138- 07/2016 ("Suit 138").

[2] In this judgment, we shall refer to the appellant as "TNB" and the respondent as "the consumer". The consumer had two contracts with TNB for the supply of electricity to the premises at Lot 140216 (MSB1) and Lot 140216-1 (MSB2), Jalan Berjaya 8/1, Perindustrian Taman Berjaya, 81200 Skudai, Johor (collectively, "the premises").

[3] For purposes of the supply of electricity to the premises, the consumer is registered as TNB's consumer under two separate TNB accounts *ie*, account numbers 0340 0082532201 ("meter A") and 0340 0082532408 ("meter B"). Unless otherwise stated to the contrary, the said meter A and meter B shall be referred to collectively, as "the TNB meters".

[4] A company which was closely connected to the consumer, known as Ice Man Sdn Bhd ("Ice Man") operated an ice-making factory at the premises. Ice Man was the previous consumer for the supply of electricity to the premises. The consumer and Ice Man had a management contract dated 1 October 2013 pursuant to which the consumer handled all matters relating to the supply of electricity to the premises. The consumer only provided management services and were not involved in the operations of the ice-making factory. Significantly, the consumer did not operate the ice-making factory. Rather, it was Ice Man which operated the ice-making factory.

[5] The issue which lies at the heart of the case is the alleged tampering of the TNB meters which were situated in the (locked) meter room and located within the compound of the premises. It was alleged that only TNB had access to the meter room. The issue of no access to the meter room was a major part of the consumer's stand where they contended (per the pleadings and oral testimony of their key witnesses) that they had no access to the meter room and as such, disavowed any knowledge of, or responsibility for any alleged tampering of the TNB meters. On the other hand, as far as TNB are concerned, upon inspection of the meter room on various dates, they discovered that the TNB meters had been tampered with.

[6] As such, TNB claimed that they were entitled to invoke their powers under s. 38(1) of the Electricity Supply Act 1990 ("the Act") and disconnect the supply of electricity to the premises. Section 38(1) of the Act provides as follows:

> (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

[7] The disconnection under s. 38(1) of the Act is predicated on an offence having been committed per s. 37(1), (3) or (14) of the Act. Here, only s. 37(1) and (3) of the Act are relevant (if at all), and they read as follows:

(1) Any person who *tampers with or adjusts any installation* or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(3) Any person who *in any manner dishonestly*:

(a) *abstracts electricity*;

(b) *consumes electricity*;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or

(e) *prevents any such meter or instrument from duly recording the output or consumption of electricity*,

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(emphasis added)

[8] For completeness, we should mention that s. 38 of the Act was amended *via* PU(B) 501/2015. The amendment took effect on 1 January 2016. However, the amendment is inconsequential as the impugned events here took place before the amendment came into force.

[9] Turning to the issue of meter tampering, the consumer's unyielding stand is that the disconnections were wrongful. The consumer initially filed two separate legal actions (see para. [21]) and eventually filed Suit 138 based on the following causes of action:

- wrongful disconnection of electricity supply to the premises on two;
- July 2014 and 8 April 2015;
- unlawful interference with the consumer's business;
- breach of statutory duty by TNB;
- defamation; and
- trespass.

[10] In this regard, it is perhaps useful to reproduce part of the evidence of Mr Goh Tack Lik (PW8), the chief executive officer of the consumer and a director of Ice Man, who was asked (per his evidence in chief), "why did Big Man initiate the current suit against TNB?" and his answer was, "Big

Man suffered great losses after TNB unlawfully disconnected the electricity supply to the premise secondly, TNB has breached its duty by revealing the private data of its consumer to a third party. Thirdly, TNB has been making false and untrue statements to defame Big Man. Fourthly, TNB has trespassed into the factory. Lastly, TNB had also interfered with the business".

[11] The dispute may be crystallised as follows – whether it had been proven that there was meter tampering in respect of the TNB meters on the several occasions when TNB's technical officers had carried out inspections of the TNB meters, and whether TNB's action in rectifying the tampered meters on each of these occasion when tampering was discovered, and later disconnecting the supply of electricity on 2 July 2014 and 8 April 2015 on account of meter tampering (after the TNB meters had been rectified), was lawful in all the circumstances.

[12] In this regard, the pertinent legal question is whether the disconnection which was carried out based on a previously discovered tampered meter (and which was then rectified by TNB) was unlawful by reason of the application of the principle which was established per the Court of Appeal's decision in *Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor* [2019] 8 CLJ 786; [2019] 2 MLJ 801 ("*Mayaria*") and upheld by the Federal Court in Civil Appeal No. 02(f)-28-03/2017(W), and subsequently endorsed/approved and reiterated by the Federal Court in *Tenaga Nasional Bhd v. Chew Thai Kay & Anor* [2022] 2 CLJ 333; [2022] 2 MLJ 25 ("*Chew Thai Kay*").

The *Mayaria* Principle

[13] What is the *Mayaria* principle? It is this. Once TNB discovers meter tampering and the impugned (tampered) meter is then rectified and/or replaced, then the offence under s. 37 of the Act is deemed as no longer subsisting (no longer extant) and ceases to exist at the time when the notice of disconnection is issued by TNB to their customer and in those circumstances, TNB cannot invoke s. 38(1) of the Act to disconnect the supply of electricity to the consumer's premises. Hence, the disconnection would be unlawful.

[14] In the present case, it was argued on behalf of TNB that there are exceptions to the *Mayaria* principle and that the present case falls within the so-called exceptions. The question is – what if any, are the exceptions to the *Mayaria* principle? According to TNB, the *Mayaria* principle does not apply to a case of repeated meter tampering and/or where TNB has already carried out the disconnection. It was contended that the cases which have hitherto come up for consideration by the courts, namely the case of *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 3 CLJ 825; *Xin Guan Premier Sdn Bhd v. Tenaga Nasional Bhd* [2016] 1 CLJ 318; [2016] 1 AMR 603; [2016] 10 MLJ 788, *Mayaria* (*supra*) and *Chew Thai Kay* (*supra*) are all

instances of a one-off act of meter tampering and where the disconnection has yet to take place. On that analysis, it was argued for TNB that the *Mayaria* principle only applied to a one-off occurrence or discovery of meter tampering, and/or when the supply of electricity has yet to be disconnected and where the consumer is seeking to restrain the disconnection which has yet to take place. These issues are dealt with elsewhere in the judgment. We turn now to the salient background facts.

Background Facts

[15] The events which gave rise to the filing of Suit 138 may be stated as follows. TNB initially carried out inspections on the TNB meters on 4 December 2013 and 6 May 2014. On 23 June 2014 and 25 June 2014, TNB issued two notices of disconnection of electricity supply in Form A schedule as a result of the inspection on 6 May 2014.

[16] The said disconnection of supply notices stated that the supply of the electricity would be disconnected on 24 June 2014 and 26 June 2014 respectively. However, the disconnection of the electricity supply did not occur on those specified dates. Subsequently, on 1 July 2014, TNB issued disconnection notices dated 1 July 2014 for MSB1 and MSB2 and disconnected the electricity supply to the premises ("first disconnection"). TNB only resumed the electricity supply for both MSB1 and MSB2 on 1 October 2014.

[17] On 27 July 2014, the consumer received four letters of demand ("LODs") dated 27 July 2014 from TNB claiming for the loss of revenue based on the allegations that the TNB meters had been tampered with and/or modified.

[18] The details of the LODs are as follows:

For meter A

- loss of revenue amounting to RM6,698.17 from 1 December 2013 until 4 December 2013 due to alleged tampering found against MSB1 during inspection 4 December 2013;
- TNB claimed for the loss of revenue amounting to RM365,137.79 pursuant to s. 38(3), (4) and (5) of the Act for the period from 4 December 2013 until 10 May 2014.

For meter B

- loss of revenue amounting to RM1,603.84 from 1 December 2013 until 4 December 2013 due to alleged tampering found against MSB2 during inspection on 4 December 2013;
- TNB claimed for the loss of revenue amounting to RM 425,091.18 pursuant to s.38(3), (4) and (5) of the Act for the period from 4 December 2013 until 6 May 2014.

[19] TNB subsequently carried out inspections on 15 October 2014 (MSB1) and 7 January 2015 (MSB2). On 7 April 2015, the consumer received notices to disconnect electricity supply to the premises. On 8 April 2015, TNB disconnected the electricity supply to the premises ("second disconnection"). TNB only resumed the electricity supply for both MSB1 and MSB2 on 14 May 2015.

[20] The first disconnection and the second disconnection were carried out by TNB following its findings of meter tampering at the premises for both the consumer's TNB accounts on 6 May 2014, and 7 January 2015 respectively.

[21] The consumer attempted to challenge the disconnection notices dated 1 July 2014 *via* Originating Summons No. 23NCVC-340-06/2014. In this regard, the consumer sought to restrain TNB from carrying out the disconnection or alternatively, sought an order that TNB reconnects the electricity supply to the premises. The High Court refused the consumer's application. The consumer had also filed an action to recover its purported losses as a result of the first disconnection *ie*, *via* Civil Suit No. 22NCVC-113-07/2014 ("Suit 113").

[22] At the same time, other events took place and, in this regard, sometime in April 2015, Ice Man executed a memorandum of understanding ("MOU") with a third party, namely, Sunshine Merchants Sdn Bhd in respect of the proposed sale of Ice Man.

[23] Following the execution of this MOU, Sunshine Merchants Sdn Bhd engaged in negotiations with TNB to resolve all issues in respect of the electricity supply to the premises under both the consumer's TNB accounts. TNB participated in these negotiations as Sunshine Merchants Sdn Bhd had purportedly shown TNB its intention to take over Ice Man. Then a surat akujanji dated 21 May 2015 between TNB and Sunshine Merchants Sdn Bhd was executed as a result of these negotiations. As a result of the surat akujanji:

(i) the consumer purportedly withdrew Suit 113; and

(ii) all loss of revenue due to the meter tampering discovered at the premises for both the consumer's TNB accounts were to be settled by Sunshine Merchants Sdn Bhd.

[24] Sunshine Merchants Sdn Bhd did not fulfil its obligations to TNB under the surat akujanji. TNB had thereafter obtained judgment in default of the amounts due and owing by Sunshine Merchants Sdn Bhd under the said surat akujanji.

The High Court's Decision

Meter Tampering – Preliminary Objection

[25] The learned judge's approach to the issue of whether there was any tampering of the TNB meters at any time in the period between the year 2013 and 2015, may be summarised as follows. The learned judge noted firstly that the Act gave TNB the right and power to disconnect electricity supply upon making a finding that the meters had been tampered with.

[26] The learned judge noted that it was TNB's case that upon inspections on 4 December 2013, 6 May 2014, 15 October 2014 and 7 January 2015, the TNB witnesses (DW1 to DW14) had discovered that the TNB meters had been tampered with. TNB submitted that it is not their duty to prove who had tampered with the TNB meters. TNB further submitted that there is no provision under s. 38(1) of the Act that TNB must first prove that it was the consumer who had tampered with the TNB meters. On the question of meter tampering, what happened during the trial is that the consumer's counsel raised a preliminary objection against TNB for raising evidence on the alleged tampering on the ground that TNB did not put forth to the consumer's relevant witnesses, the photographs and documentary evidence purportedly showing the alleged tampering, or what the TNB witnesses saw during the inspection, and cross-examine the consumer's witnesses on the same. It was submitted on behalf of the consumer that none of the crucial and specific facts of TNB's case on the alleged tampering were put to the consumer's witnesses during cross-examination. Essentially, it was argued for the consumer that TNB had breached the rule in *Browne v. Dunn* (1893) 6 R 67 (HL).

[27] The learned judge reserved his decision at the end of the trial and eventually accepted the preliminary objection and went on to make a finding that TNB had adduced and led evidence on the alleged tampering for the first time when conducting its case for the defence, and that nothing was specifically put forward *ie*, the material facts of its case on the alleged tampering, during the cross-examination of the consumer's witnesses.

[28] The learned judge held that the relevant witnesses of the consumer had, in their witness statements, stated that they did not have access to the TNB meters and also denied claims or knowledge of the alleged tampering.

Illegal Disconnection Of Electricity

[29] The learned judge concluded that there was no challenge to these testimonies and that it was totally unfair for TNB to raise evidence on the same without giving the opportunity to the consumer's witnesses to challenge, explain or contradict the same. As far as the learned judge was concerned, the veracity of TNB's evidence on the alleged tampering was not tested and there was nothing on the record against which the proposed

evidence by TNB could be weighed and evaluated by the court. Therefore, the failure of TNB to put forth those facts and cross-examine the consumer's witnesses amounted to an abandonment by TNB of this part of the defence.

[30] The next issue lies at the heart of the appeal, *ie*, whether the disconnection of electricity supply was illegal? The learned judge's approach was as follows. First, the learned judge noted that it was not disputed by both parties that the disconnection of supply was done at the premises, in respect of MSB1 and MSB2 respectively on 2 July 2014 and 8 April 2015. This fact was testified by DW20. TNB submitted that the disconnections of electricity supply for the consumer's premises were legal and in accordance with s. 38(1) of the Act.

[31] TNB submitted that in the case of repeated meter tampering, TNB does not lose the right to disconnect the electricity supply even if the tampering has been rectified and is no longer extant. TNB has the statutory right to do so upon discovery of tampering on the meter installation pursuant to s. 38 of the Act. The consumer on the other hand submitted that the alleged tampering had been rectified and was no longer extant and as such the first disconnection (2 July 2014 – 1 October 2014) and the second disconnection (8 April 2015 – 14 May 2015) were unnecessary, deliberately calculated to be punitive and used as a means to obtain payment from the consumer.

[32] It was also the submission of the consumer that TNB cannot invoke s. 38(1) of the Act if the alleged tampering was halted and no longer extant and to recover the loss of revenue (per the *Mayaria* principle). The learned judge agreed with the consumer's proposition and concluded that the disconnection of electricity supply at the consumer's premises on 2 July 2014 and 8 April 2015 were illegal, and that TNB had breached the electricity supply contract twice. Thus, the consumer was entitled to claim damages for the wrongful disconnections.

Damages For Wrongful disconnection

[33] As for damages for the wrongful disconnection, the consumer claimed special damages comprising of the cost of renting diesel generators, the purchase of diesel fuel and compensation which had to be paid to Ice Man. The learned judge held that special damages (as claimed) had been proven and allowed the consumers claim for special damages in the sum of RM2,907,931.40 (first disconnection) and RM652,012.20 (second disconnection). The learned judge also ordered exemplary damages at 25% of the sum of special damages awarded for the wrongful disconnection of electricity to the premises.

[34] In respect of the special damages claim, the learned judge opined (paras. [91] to [93] of the grounds of judgment) that due to the disconnection of the electricity supply, the consumer had (i) to rent and later buy a generator to ensure the unhindered operation of the ice-making business; and (ii) to purchase diesel in powering the generator, the costs of which was twice the price of electricity supply by TNB. Thus, the learned judge made a finding that special damages totalling RM2,907,931.40 and RM652,012.20 were incurred due to the first and second disconnections, respectively. According to the learned judge, the damages were the direct result of the non-supply of electricity and one "which the parties knew, when they made the contract, to be likely to result from the breach of if". As the damages came within the second limb of s. 74 of the Contracts Act 1950, the consumer was entitled to recover from TNB the compensation for the same. (paras. [91] to [93] of the grounds of judgment).

Exemplary Damages

[35] The learned judge concluded that TNB had conducted itself in ways which called for exemplary damages as follows: (i) intentionally punishing the consumer through the disconnection of electricity supply – the lifeblood of the business; (ii) intentionally prolonging the first disconnection for a maximum of three months without any acceptable basis even though, by their own admission, the maximum period was not applied to first-time disconnections; (iii) refusing to meet the consumer's representative for possible reconciliation and showing insolence; (iv) mounting a baseless claim of tampering, particularly with respect to the period of the first disconnection as the purported basis for the second disconnection and yet took no legal proceedings to pursue the claims; and (v) effecting the second disconnection with impunity and without any regard for the pending case against the first disconnection and without waiting for judicial pronouncement on the rights of the consumer under the Act. The learned judge held that the purpose of awarding the exemplary damages was to punish TNB and to deter TNB from misbehaving in the future. The consumer was accordingly awarded exemplary damages amounting to 25% of the special and general damages awarded. (see paras. [98], [99] & [108] of the grounds of judgment).

Defamation

[36] The next issue is whether TNB's representative, En Mohd Fauzi bin Husin (DW19) had made a defamatory statement against the consumer. In this regard, the learned judge made a finding that on 8 May 2015, the impugned representation was made by DW19, to Pn Noor Azah Azizan (PW5) through a phone call. The impugned representation was subsequently reduced to writing and sent by PW5 to Sunshine Merchants Sdn Bhd *via* a letter dated 8 May 2015. The learned judge held that TNB had per paras. [39] and [45] of its defence admitted making the impugned representation through the phone call and was therefore not disputed.

[37] The issue before the High Court was whether the consumer had established the cause of action for defamation. In the present case, the learned judge held that DW19 had made statements which were defamatory in nature and/or with malicious intent to PW5, to the effect that the consumer had tampered and/or modified the meters. Based on the seriousness of the defamation, the consumer's reputation and standing and based on the effect of the statement to their dignity, the consumer was awarded RM25,000 as general damages, and RM25,000 as aggravated damages.

[38] On the issue of defamation, the learned judge held that DW19 had made statements to PW5 which were defamatory in nature and/or were malicious. In their natural and ordinary meaning, the words meant and were understood to mean that the consumer had (i) tampered and/or altered the meter; (ii) stolen the electricity supply for the premises; (iii) done something illegal; (iv) had been charged and TNB had taken court action against the consumer; (v) the consumer had repeatedly committed the same wrongdoings; and (vi) had acted unreasonably as a consumer. The impugned representation was then reduced to writing and sent to Sunshine Merchants Sdn Bhd *via* a letter. The representation was defamatory as it tended to lower the consumer in the estimation of any reasonable man. The consumer had further proven that the words complained of had been published to a third party by TNB. (paras. [115], [122], [123] and [134] of the grounds of judgment)

[39] The slanderous remarks were actionable *per se* at the consumer's instance and there was no necessity for the consumer to prove actual damage. Based on the extent of the publication of the defamatory statement, the seriousness of the defamation, the consumer's reputation and standing and the effect of the statement to their dignity, an award of RM25,000 each for general and RM25,000 for aggravated damages would be fair and reasonable. (paras. [145] and [147] of the grounds of judgment)

Breach Of Statutory Duty

[40] The next issue was whether TNB had breached the provisions of the Act and infringed the consumer's right (breach of statutory duty) as a registered electricity user by divulging the consumer's account details to a third party (Sunshine Merchants Sdn Bhd) without the consumer's consent. The claim in this regard may be gleaned from the following paragraphs of the amended statement of claim, namely:

> 104. Selanjutnya Plaintif memplidkan bahawa Defendan telah menjejaskan hak Plaintif sebagai pengguna bekalan elektrik dengan mendedahkan butir-butir akaun Plaintif kepada pihak ketiga serta memasuki perjanjian dengan pihak ketiga tanpa pengetahuan dan kebenaran Plaintif.

105. Oleh itu Defendan telah melanggar kewajipan berkanun "breach of statutory duty" dengan bertindak di luar bidang kuasa yang diberikan di bawah Akta Bekalan Elektrik 1990 dan Peraturan-Peraturan Bekalan Pemegang Lesen 1990.

[41] The following extracts from the High Court's grounds of judgment are relevant to the purported cause of action of breach of statutory duty.

Breach of statutory duty – disclosure of the consumer's information to Third Parties

Breach Of Statutory Duty

The defendant had acted beyond its jurisdiction, without permission and/or consent from the consumer as a registered user as:

(i) The defendant revealed the consumer's account details to a third party by conducting a discussion with Puan Noor Azah Azizan ('Azah') on 8 May 2015 which involved the following items:

(a) the settlement of the disputed sum by the consumer;

(b) the settlement of the electricity bills in arrears for the consumer's premises;

(c) the withdrawal of the consumer's court case against the defendant;

(d) the preparation of a company resolution by Ice Man to facilitate a change of Ice Man's management to Sunshine Merchants;

(e) the preparation of a letter of undertaking by Ice Man to sell stocks to the nominee of Sunshine Merchants; and

(f) the backdating of documents in para. (d) and (e) to the date of the memorandum of undertaking.

(ii) On 20 May 2015, the defendant had signed the instalment payment letters with Sunshine Merchants which stated:

(a) the consumer agrees to settle the disputed sum and the current bills in arrears in instalments; and

(b) that the defendant has the right to disconnect electricity supply without serving a notice of disconnection.

(iii) On 21 May 2015, the defendant had signed the Sunshine Merchants letter of undertaking which was prepared by the defendant with the following terms:

(a) that Sunshine Merchants agreed that the consumer had tampered and/or modified the meters and had to settle the disputed sum to the defendant;

(b) that Sunshine Merchants will settle the disputed sum to the defendant in instalments; and

(c) that Sunshine Merchants will ensure that the consumer's court case against the defendant will be withdrawn.

A [32] The consumer only became aware of the instalment payment letters and the letter of undertaking after the consumer had met with the defendant's officer at the defendant's branch office due to receiving two copies of notices dated 22 June 2015 which claimed that two cheques for a total of RM50,000 could not be honoured.

B **[42]** On the issue of breach of statutory duty, the learned judge made a finding that based on the evidence of PW5, in the midst of the second disconnection, Sunshine Merchants Sdn Bhd entered into a memorandum of understanding dated 10 April 2015 with Ice Man with the intention to take over Ice Man. According to PW5 and DW18, various phone calls were held between Sunshine Merchants Sdn. Bhd. and TNB without the knowledge of C the consumer *ie*, the electricity account holder.

[43] As a result of the discussion, a surat akujanji was signed between TNB and Sunshine Merchants Sdn Bhd, who purportedly acted on the consumer's behalf. According to the surat akujanji, the consumer purportedly admitted D to liability and quantum *vis-a-vis* meter tampering. The consumer also purportedly agreed to withdraw Suit 113 filed against TNB for the wrongful disconnection in 2014.

[44] The learned judge was of the view TNB was liable for infringing the consumer's right as a registered electricity user by divulging the consumer's E account's detail to Sunshine Merchants Sdn Bhd without the consumer's consent. Thus, the learned judge awarded the sum of RM20,000 for general damages against TNB.

Tort Of Interfering With The Consumer's Business

F **[45]** The other issue is whether by their actions TNB had committed the tort of unlawfully interfering with the consumer's business. In this regard, the learned judge found that based on the evidence produced, the consumer had failed to prove that TNB had unlawfully interfered with the consumer's business as required under the law. Thus, upon perusing the evidence presented, the High Court found that the consumer had failed to fulfil the G requirements set out in *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2)* [2009] 8 CLJ 130; [2009] 3 MLJ 525 where Justice Low Hop Bing (later JCA) set out the elements necessary to establish a cause of action for the tort of unlawful interference with trade. At pp. 144 to 145 (CLJ); pp. 537 to 538 (MLJ) of the judgment in *Megnaway*, Justice Low Hop Bing said:

H [48] The elements which constitute the tort of unlawful interference with trade or business are:

(1) Interference with the plaintiff's trade or business;

(2) Unlawful means;

I (3) Intention to injure the plaintiff; and

(4) The plaintiff is injured thereby.

(See *Bullen & Leake & Jacob's Precedents of Pleadings* [1990] p 464).

[49] Although unlawful interference with trade is a developing tort and of uncertain ambit, its existence is beyond doubt and certain of its features are clearly defined. In *H & R Johnson (Malaysia) Bhd v. H & R Johnson Tiles Limited & Ano*r [1995] 2 CLJ 581 at p 593, Zakaria Yatim (later FCJ), citing authorities, said:

> ... If one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract: *Torquay Hotel Co Ltd v. Cousins & Ors* [1969] 2 Ch 106, 139 per Lord Denning MR.

[46] The consumer did not appeal against the dismissal of the claim for unlawful interference with the consumer's business. Before us, it was argued for the consumer that this court could still entertain the claim for unlawful interference with the consumer's business pursuant to s. 69 of the Courts of Judicature Act 1964. We do not think so. In our view, if the consumer was aggrieved by the dismissal of the claim for unlawful interference with the consumer's business, then they ought to have lodged an appeal. Section 69 of the Courts of Judicature Act 1964 cannot be called in aid to entitle the consumer to circumvent their failure to lodge an appeal (or cross-appeal) against the dismissal of that part of their claim relating to unlawful interference with the consumer's business. See: *Douglas Ding Jangan & Ors v. Kerajaan Negeri Sarawak & Ors* [2021] 7 CLJ 653; [2021] 4 MLJ 946 where the Federal Court stated that s. 69 Courts of Judicature Act 1964 "cannot be interpreted to mean that the appellate jurisdiction of the Court of Appeal extends to the setting aside of the decision of the High Court that is not the subject of an appeal by the appellant.". As such, we have no hesitation in rejecting the consumer's plea for the claim for unlawful interference with the consumer's business to be allowed.

Trespass

[47] The learned judge also allowed a sum of RM50,000 as general damages for trespass in respect of an incident which occurred at the premises on 19 August 2015 at 2.57am. In so far as the claim for the trespass is concerned, it is not in dispute that in light of the Federal Court's decision in *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179, the consumer's claim for damages for trespass is no longer sustainable or tenable.

[48] Thus, counsel for the consumer magnanimously conceded that the award of RM50,000 as damages for trespass ought to be set-aside. As such, we allow this part of TNB's appeal and set aside the award of RM50,000 as damages for trespass.

Order Dated 30 September 2019

[49] The reliefs allowed by the High Court are set out in the sealed order dated 30 September 2019 and they read as follows:

(a) Tuntutan Plaintif terhadap Defendan untuk gantirugi khas sebanyak RM2,907,931.40 untuk kos-kos tanggung kerugian akibat pemotongan bekalan elektrik kali pertama di premis Plaintif dibenarkan,

(b) Tuntutan Plaintif terhadap Defendan untuk gantirugi khas sebanyakRM652,012.20 untuk kos-kos tanggung kerugian akibat pemotongan bekalan elektrik kali kedua di premis Plaintif dibenarkan;

(c) Tuntutan gantirugi am oleh Plaintif terhadap Defendan dalam mengganggu perniagaan Plaintif secara salah di sisi undang-undang dan menyebabkan Plaintif mengalami kesukaran dan kerugian ditolak,

(d) Tuntutan Plaintif terhadap Defendan bagi gantirugi am sebanyak RM20,000.00 kerana menjejaskan hak Plaintif sebagai pengguna bekalan elektrik yang berdaftar dengan mendedahkan butir-butir akaun Plaintif kepada pihak ketiga tanpa kebenaran Plaintif dibenarkan;

(e) Tuntutan Plaintif terhadap Defendan bagi gantirugi am sebanyak RM25,000.00 dan gantirugi teruk sebanyak RM25,000.00 kerana mencemarkan dan memfitnahkan Plaintif dengan membuat kenyataan fitnah kepada pihak ketiga dibenarkan;

(f) Tuntutan Plaintif terhadap Defendan bagi gantirugi am sebanyak RM50,000.00 akibat pencerobohan oleh Defendan dalam kawasan premis Plaintif pada 19/8/2015 dibenarkan;

(g) Suatu perintah injunksi untuk menghalang Defendan dan/atau pegawai-pegawai Defendan dari memasuki ke premis Plaintif dan/atau mengulangi perbuatan Defendan dan/atau memotong bekalan elektrik dan/atau memotong bekalan elektrik dan/atau mengganggu perniagaan Plaintif dalam apa jua cara ditolak:

(h) Suatu perintah deklarasi bahawa Defendan mengeluarkan jumlah RM1,116,638-31 dari akaun meter-meter Plaintif iaitu 03400082532201 dan 03400082532408 ditolak.

(i) Suatu perintah deklarasi bahawa Plaintif tidak pernah masuk ke bilik pepasangan meter elektrik dan mengusik dan/atau mengubahsuai meter-meter tersebut di premis Plaintif dibenarkan:

(j) Suatu perintah deklarasi bahawa Plaintif tidak pernah berhutang apa-apa jumlah tuntutan terhadap Defendan berhubung hasil pemeriksaan-pemeriksaan oleh Defendan di premis Plaintif pada 4/12/2013, 6/5/2014, 10/5/2014, 15/10/2014 dan 7/1/2015 dibenarkan;

(k) Suatu perintah deklarasi bahawa Defendan mengeluarkan jumlah RM151,016-15 dan RM167,469-77 daripada akaun meter-meter tersebut ditolak;

(l) Suatu perintah deklarasi bahawa Surat Tuntutan TNB bertarikh 1/2/2016 tersebut adalah tidak sah dan terbatal dibenarkan;

(m) Tuntutan Plaintif terhadap Defendan bagi gantirugi teladan sebanyak 25% atas gantirugi khas dibenarkan di perenggan (a) dan perenggan (b) dan gantirugi am yang dibenarkan di perenggan (d) iaitu masing-masing sebanyak RM726,982-85, RM163,003.05 dan RM5,000.00 dibenarkan;

(n) Tuntutan Plaintif terhadap Defendan bagi faedah pre-judgment 3% setahun ke atas gantirugi khas RM2,907,931-40 yang bermula dari tarikh akhir pemotongan bekalan elektrik kali pertama pada 01/10/2014 sehingga tarikh penghakiman berjumlah RM436,189-70 dan faedah pre-judgment 3% setahun ke atas gantirugi khas RM652,012-20 bermula dari tarikh akhir pemotongan bekalan elektrik kedua pada 14/05/2015 sehingga tarikh penghakiman berjumlah RM85,744-09 dibenarkan;

(o) Tuntutan Plaintif terhadap Defendan bagi faedah post-judgment sebanyak 5% setahun atas jumlah RM4,574,929-50 dari tarikh penghakiman sehingga penyelesaian sepenuhnya dibenarkan; dan

(p) Kos sebanyak RM40,000-00 tertakluk kepada fi alokatur dibayar oleh Defendan kepada Plaintif.

The Trial

[50] Parties identified the following issues to be determined at the trial:

(2) Sama ada berlakunya usikan pada pepasangan meter-meter elektrik di premis Plaintif pada bila-bila masa di antara tahun 2013 dan 2015?

(3) Sama ada Peruntukan Akta Bekalan Elektrik 1990 memerlukan Penyata Bertulis diserahkan kepada Plaintif?

(4) Sama ada kedua-dua pemotongan bekalan elektrik di Premis Plaintif adalah sah?

(5) Sama ada pekerja Defendan, En. Mohd Fauzi telah mengeluarkan kenyataan-kenyataan yang merupakan suatu fitnah dan/atau libel terhadap Plaintif?

(6) Sama ada pegawai/pekerja Defendan telah mencerobohi 'trespass' premis Plaintif dengan memasuki kepremis Plaintif pada 19 Ogos 2015, jam 2.57 pagi?

(7) Samada keseluruhan perbuatan Defendan merupakan suatu usikan dan gangguan secara tort terhadap Defendan dan perniagaan Defendan (tort of interference)?

The Witnesses

[51] The consumer called nine witnesses to testify. They were:

PW 1 Azlin binti Mohd Kasran

PW 2 Lim Yong Chiang

PW 3 Wong Thim Hock

PW 4 Leow Kah Pow

PW 5 Noor Azah Azizan bt Mohammed Ali Azizan

PW 6 Mohd Zuki bin Ismail

PW 7 Ser Boon Hwa

PW 8 Goh Tack Lik

PW 9 Ibrahim Haikal bin Razak

[52] PW1 (Azlin binti Mohd Kasran) – an employee of Ice Man who acknowledged and signed TNB's meter inspection documents dated 4 December 2013.

[53] PW2 – the director of Kuang Yi Machinery & Trading Sdn Bhd who purportedly "... menyewa dan menjual mesin-mesin janakuasa kepada Ice Man dan/atau Big Man." He testified that he did not issue any receipts for payments that were purportedly made. (See: Q/A No. 17 of PW2's witness statement). He said, "Tidak. Sebab Kuang Yi Machinery akan merujuk kepada penyata akaun untuk mengenal pasti samada bayaran telah di selesai."

[54] PW3 the consumer's director. It is critical to note that SP-3's evidence was that:

PD: Mr. Wong tau tak pejabat Bigman dimana?

SP3: *Mr. Wong tidak tahu kerana selama ini Mr. Wong selalu berada di Singapor*e.

PD: Mr. Wong tau tak peranan Mr Wong sebagai Director Bigman?

SP3: *Mr. Wong tidak pasti, untuk, setahu Mr. Wong adalah untuk menguruskan kerja sahaja. Yang lain Mr. Wong tidak pasti*.

PD: Uruskan kerja apa?

SP3: *Mr. Wong tidak kerjakan apa-apa kerana kerja-kerja diuruskan oleh Alex.*

PD: Alexpengarah Bigman ataupun tidak?

SP3: Alex adalah CEO Bigman. Semua kerja diuruskan Alex.

(emphasis added)

[55] PW4 – an employee of Ice Man who acknowledged and signed TNB's meter inspection documents dated 6 May 2014.

[56] PW5 – a former lawyer of Sunshine Merchants Sdn Bhd. She, *inter alia*, gave evidence that she attended to discussions between Sunshine Merchants Sdn Bhd and TNB in the negotiations between them to settle all issues in respect of both the consumer's TNB accounts.

[57] PW6 – an external security guard who was on duty at the premises during TNB's inspection on 18 August 2015. It is pertinent to note that PW6 gave evidence that the ice factory at the premises was operating selama 24 jam sehari".

[58] PW7 – the consumer's "'pengurus" and the "'pengurus am" of Ice Man Sdn Bhd. He however gave evidence that he is salaried by Ice Man.

[59] PW8 – the consumer's CEO as well as a director and shareholder of Ice Man.

[60] PW9 – a lawyer who advised PW8 on the business of the consumer and Ice Man.

[61] TNB called 20 witnesses to give evidence.

DW 1 Mohd Hafizul bin Sauti
DW 2 Mohd Reduan bin Dapor
DW 3 Sharul bin Bahar
DW 4 Nik Mohd Azri Affandi bin Nik Mahmood
DW 5 Mohamad Syukri bin Abdul Aziz
DW 6 Wali Mohammad Gulam Sariff bin Md Yusoff
DW 7 Muhammad Ikhwan bzin Khairel Salleh
DW 8 Muhammad Yusoff bin Hasnan
DW 9 Mohd Zulhelmi bin Mohd Yusoff
DW 10 Hasbullah bin Sabran
DW 11 Hizri Hilmi bin Abdul Shukor
DW 12 Mohd Firdaus bin Abdul Wadi
DW 13 Mohd Rahimi bin Hashim
DW 14 Wan Zulhilmi bin Wan Mokhtar
DW 15 Zahari bin Md Zuki
DW 16 Nazirah binti Abdul Nasir
DW 17 Mohamed Nasser bin Ariffin
DW 18 Mohd Azfar bin Azhari
DW 19 Mohd Fauzi bin Husin
DW 20 Arizal bin Ashari

[62] DW1, DW2 and DW3 – were part of the TNB inspection team that carried out the inspection of the meter for account A at the premises on 4 December 2013. TNB's inspection team discovered that its meter had been tampered.

[63] DW4, DW5 and DW14 – were part of the TNB inspection team that carried out the inspection of the meter for account B at the premises on 4 December 2013. TNB's inspection team discovered that its meter had been tampered.

[64] DW6, DW7 and DW8 – were part of the TNB inspection team that carried out the inspection of the meter for both the consumer's TNB accounts at the premises on 6 May 2014. TNB's inspection team discovered that both its meters had been tampered.

[65] DW1, DW9 and DW12 – were part of the TNB inspection team that carried out the inspection of the meter for account A at the premises on 15 October 2014. TNB's inspection team discovered that its meter had been tampered.

[66] DW10, DW11 and DW14 – were part of the TNB inspection team that carried out the inspection of the meter for account B at the premises on 7 January 2015. TNB's inspection team discovered that its meter had been tampered.

[67] DW13 and DW17 - were the TNB employees who served TNB's notices of disconnection dated 23 June 2014, 1 July 2014 and 7 April 2015 to the consumer for both the consumer's TNB accounts. In this regard, it is critical to note that the disconnection notices issued are in respect of TNB's findings of meter tampering *ie*, they were issued in accordance to Borang A of the Schedule to LSR 1990 (pursuant to reg. 6A(1) LSR 1990).

[68] DW15 – the police inspector who accompanied TNB's inspection team during the inspection of TNB's meters for both the respondent's TNB accounts at the premises on 19 August 2015. DW15 had adduced the warrants (dated 17 August 2015) obtained for purposes of his entry during the said inspection.

[69] DW16 – the TNB employee who had issued the debit letter dated 20 July 2014 and the cancellation of the said debit letter *vide* letter dated 10 September 2014.

[70] DW18 – TNB engineer who lodged the police report dated 5 July 2014.

[71] DW19 (Mohd Fauzi bin Husin) – the TNB employee who is alleged to have slandered the consumer. DW19 gave uncontroverted evidence that he did not utter the words alleged by PW5 in her letter of 8 May 2015.

[72] DW 20 (Arizal bin Ashari) – TNB engineer who instructed the TNB inspection teams to carry out the inspections on TNB's meter for both the consumer's TNB accounts at the premises. DW20 was also the engineer who ordered the disconnection of the electricity supply to the premises on 2 July 2014 and 14 May 2015.

Our Decision

Was There Meter Tampering?

[73] We shall start with the meter tampering issue. The question is, was there meter tampering? Indeed, this was the first issue to be tried. It is important to bear in mind that the question was/is not whether the consumer was responsible for meter tampering. The distinction is important.

[74] Indeed, we would go so far as to say that the identity of the person(s) responsible for meter tampering is irrelevant as TNB does not have to prove that it was the consumer who tampered with the meters. The fact that the meters were tampered is enough. See: Court of Appeal's decision in *Thomas Thomas v. Tenaga Nasional Bhd* [2017] 4 CLJ 340; [2018] 5 MLJ 831 where it was stated unequivocally that:

> [11] TNB's right to commence civil proceedings against its registered consumers for losses due to the commission of offences under s. 37(1), (3) and (14) of the ESA is covered by s. 38(3)-(5) of the ESA. For purposes of a claim under s. 38(3)-(5), we take the view that **it is not necessary for TNB to prove the identity of the person who damaged or tampered with the meter**.
>
> (emphasis added)

[75] It is axiomatic that the burden of proof is on TNB to prove that they had discovered that meter tampering had taken place on the occasions when inspections were carried out by the TNB inspection team. In *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557; [2018] MLJ 14, the Federal Court explained that the question as to whether there was meter tampering is to be based on a "subjective finding" by the TNB inspection team. At para. [27], the Federal Court explained as follows:

> [27] Another reason for the conflicting views of judicial opinion was the misreading of s. 38 itself. Sections 38(1) and s. 38(3) of the Act are interrelated. *It is clear from s. 38(1) and s. 38(3) that the person who decides whether an offence has been committed under s. 37(1), (3) or (14) of the Act is the "person employed by a licensee". The licensee is TNB. The finding whether an offence has been committed or not is based purely on the subjective finding of the employee*: (See *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd*). If the person employed by the licensee decides that an offence under s. 37(1), (3) or (14) has, in his opinion been committed, he may then require the consumer to pay for the loss of revenue. For example, if there is in his opinion, evidence of meter tempering he may then require the consumer to pay for the loss of revenue. At that point of time, the matter had not been brought to the court.
>
> (emphasis added)

The Preliminary Objection

[76] In the present case, it is clear that at the end of the trial, the learned judge upheld the preliminary objection raised by learned counsel for the consumer when TNB's witness was testifying on the meter tampering issue and concluded in his grounds of judgment that TNB had, violated the rule in *Browne v. Dunn* as the consumer's key witnesses were (allegedly) not confronted with the meter tampering issue and documentary evidence (inspection reports/photographs *etc*) when they were on the witness stand and thereby abandoned that part of their defence *vis-a-vis* meter tampering.

[77] The preliminary objection was raised whilst evidence was being adduced during the defence stage of the trial. The relevant part of the transcript of the notes of proceedings reads as follows:

PP: For good order, I just want to raise it. Third and final issues, probably a bit more serious. *This is a point now as far as my client's case and evidence, particularly Goh Tack Lik and James, that they have not done any tampering or whatsoever*. This whole claim by TNB are all interference *etc etc*. Now, first witness that came to say substantively about tampering is DW3 who do this nice diagram for us.

YA: But subject to be cross kan?

PP: Yes. My issue is this it occurred to me on the day itself because we don't know the continue with cross for the day I reserved it on the next day, I informed my colleagues by since he wasn't called back that day, so i take it up this occasion. Issue is this, he had given a specific evidence to say this is the means of tampering, mode of tampering. He is also given photos and

YA: Yang cucuk tu? Tali tangsi tu kan?

PP: And apparently that tali came through and tarik jatuh semua la. *Now, this is very specific evidence about the type of tampering that allegedly occurred. The issue is this, the rule in Browne v. Dunn says that if there is to be something that you want to put to this suit, that there was see that happened was done by the plaintiff, you must put it to the plaintiff witness*, specifically to say we have found A B C D. They can say yes no or they can explain. They can even explain why this is improbable because of whatever circumstances that they may be aware of. In this case, one of things were specifically put, at least generally la

YA: By you?

PP: No, by defence counsel. *During cross examination of the plaintiff, relevant witnesses. This case will only be James and Alex. Nothing was put. So in my view, this cannot be brought up now. This is abandonment of their so called defense or particulars of the defense that they relied upon, Yang Arif if I can refer is in generally speaking the priniciple is stated in Sivalingan, Court of Appeal*

YA: Tu bukan kes accident ke?

PP: Sivalingam, yes it was in detention camp. it was accident and so called raised of detention. But the principle is at page 400, last past Yang Arif. As cited at (e), further and more importantly it was never put to plaintiff cross examination that such request had come from him. The trial judge taken this failure into account and came to disbursed the evidence. Now then they refer to principle in *Aik Ming*, I think Yang Arif also recalled. It had cited a few other points. I have *Aik Ming* here as well. But portion yang saya rujuk tu only this point, thats why I said alot of points yang dah decided

YA: Ok so?

PP: But the portion I merujuk itu is only to this point. That's why I said a lot of other points, company law as well. Yang Arif, we refer to *Aik Ming* at page 794, at para (1) that i have highlighted. Again, they have been about the essential the parties and the opponent of the material witnesses when they are under cross examination. But failure in this respect, it will be treated of the abandonment of the pleaded case and the parties of the absent of valid reason refrained from doing so, then it may be barred from raising it in argument. Further down, referring to the, because the principle comes from *Browne v. Dunn*, Yang Arif will be aware, this is what the Lord Chancellor had to say. Now my Lord cannot held saying that it is need to do absolutely essential to proper conduct course, where it is intended to suggest that the witnesss is not speaking the truth on the particular point to direct his attention to the fact by some put in cross showing that that is implication is intended to be made, and not to take this evidence and pass it by at the matter unchallenged and then when it is impossible for him to explain, as perhaps it might be unable to. If it put to him, the circumstances which is suggested indicate that the story it tells or not, will argue that a witness is unworthy. I wont go on with that but further down, Lord Halsbury had to say my Lord the vidence in this case i cannot express my concurrence with Lord Channcellor as the trial should be conducted. To my mind it would be more absolutely unjust and not cross examine witnesses upon evidence which then given. So as to give them notice and to give them opportunity of explanation, and the opportunity is to defend their own character and not having given them such opportunity to ask the jury of the worst is to believe what they have said. Then it goes on they also refer my Lord, Court of Appeal here refers to further down where *Browne v. Dunn* has been applied in the Indian course. Where Justice Mukharji where his stated lawyers clear of the subject and wherever the your opponent had declined to avail himself the opportunity or to put essential in cross, it must follow that he believe the testimony given to be disputed as well.

YA: I think tak payah la. I think case ni pun Hip Tong, it is about affidavit evidence.

PP: That case is a little bit different.

YA: Yang ni more on trial, witnesses go by trial. Tapi sama je prinsip dia. Let say you swore something, you tak jawab tu amount to admission.

PP: Yes. Indeed. *So here what happened was we stated we here we did not do anything. All that was suggested to the plaintiff witness was oh you did tamper. When what should have been, because we don't what are they case going to be*. They should be specific reference to say now look at this photo, *this is how you tampered*.

YA: Macam ni la En Mithran, saya taknak buang masa, kita pun dah panggil saksi dah banyak. You leave it on submission but all your objection, i akan record. I think we call next witness. I take not of what you said. Because it is their case, I cannot tell councel you do this you do that. That is amount i am taking side. So, you all lawyers, you do your job you know what you are doing, and you submit about me and I don't know whether En Amierul or Puan Izatunlina, they have also some other authority to say otherwise, I just listen both side and I made my decision.

PP: I am obliged my Lord for recording that. Why I had to raised this was because I had involved in many cases where if this is not raised

YA: Amount to

PP: Defense is actually being stopped. And barred from raising this evidence

YA: Takpe this one.

PP: Okay I take your Lordship point. I just wanted to record. Thank you my Lord.

PD: We leave it for submission.

(emphasis added)

[78] At his juncture, it is perhaps relevant to refer to the Federal Court's decision in *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179, [2021] 7 AMR 857, [2021] 5 MLJ 937, which touched on the court's duty to make inferences and logical conclusions on the basis of the evidence that is presented. In this regard, paras. [70] and [74] are relevant;

> [70] In our view, the question of irrebuttable or rebuttable presumptions does not arise insofar as sub-s. 38(1) of the ESA 1990 is concerned. This is simply an inference that can be logically drawn from established fact. There is a rational relationship between the discovery of metal clamp and the inference to make that the customer caused the diversion to prevent full registration, reading and/or recording of electricity consumption by the meter. The fixing of a metal clamp at the test terminal block of TNB's meter leads to one logical conclusion that the meter had been tampered with. The law of evidence recognises an abundance of inculpatory

evidence and/or circumstances that leads to a single logical conclusion. It simply meant that the court is required to make logical inference and to attribute meaning to the evidence.

[74] We reiterate that a factual inference must be based upon relevant evidence, not conjecture and must be such that a rational mind can reasonably draw from it the conclusion that the fact exists. In this regard, it is open to the defence to challenge the inference's reasonableness. The respondent is at liberty to adduce direct or circumstantial evidence during the trial that would break the obvious connection between consumption of the electricity and the inference that the meter had been tampered with and caused the diversion and the inference could be reasonably and logically drawn. It is incumbent upon the court to resolve conflicts in the testimony, to weigh the evidence from all angles and perspective and determine whether the inferences are reasonable based upon the combined effect and cumulative force of all the evidence adduced before the court.

[79] Essentially, the learned judge concluded that meter tampering was only brought up during the defence stage. But, our reading of the evidence suggests otherwise. In this regard, we start by referring to the evidence of Ser Boon Hwa (PW7). PW7 was the manager of the consumer. He was also the general manager of Ice Man since 2011. Undoubtedly, as the manager of the consumer, and general manager of Ice Man, PW7 would be ideally placed to testify on the allegation of meter tampering.

[80] On the issue of meter tampering, PW7 said (per his witness statement) that the meter room was locked and that only TNB had access to the meter room. He disavowed any knowledge about meter tampering and said, "kami hanya melakukan perniagaan ais sahaja dan tidak mempunyai kepakaran mengubahsuai atau mengusik pemasangan meter". Basically PW7's evidence in chief on meter tampering was to establish that the consumer had nothing to do with any meter tampering. During cross-examination PW7 was asked, "Tahu kenapa bekalan elektrik di Big Man dipotong pada 2 Julai 2014?", and he answered, "sebab pihak TNB mangatakan pihak kami ada kecurian electricity." TNB's counsel then said, "mengusik pepasangan meter ke?", and his response was "Dalam Bahasa Cina maksudnya kecurian", and the learned judge interjected to say, "mengusik pepasangan meter".

[81] We also refer to the evidence of Goh Tack Lik (PW8), the chief executive officer of the consumer who was asked (per his supplementary witness statement) in obvious reference to the meter tampering allegation, "what is your stand on the allegation made by TNB" and he said, "We did not tamper with the meters'". The following parts of PW8's cross-examination are relevant to the issue at hand;

PD: So can I say when the first inspection carried out by TNB, the registered consumer for that premises is Big Man?

SP8: Yes

PD: Were you at the factory when they carried out the inspection?

SP8: No

PD: That time you already been appointed as CEO for Big Man?

SP8: Yes

PD: What about the other three inspection in 2014 and 2015?

SP8: No

PD: Do you know about the inspection?

SP8: I aware after couple of days.

PD: Informed by who?

SP8: James

PD: What did James tell you?

SP8: He told me that there is an inspection

PD: And the outcome, did he inform you?

SP8: No

PD: Did you ask James?

SP8: I did not ask him.

PD: So as a CEO of Big Man, did you go to TNB right after the inspection? Lets take the first date, 4th December 2013. Did you go to TNB after that?

SP8: I have been there but I cannot recall much

PD: Did James or Azlin showed you any form that they received from TNB?

SP8: No.

PD: For all the inspection? From 2013 to 2015? You did not see the form?

SP8: I did not see. Because number one I don't know what the form about. I seldom there.

PD: My question is did you see the form?

SP8: No

PD: And James and Azlin did not pass you any form?

SP8: No

PD: **Did you know that the tampering was discovered at meter installation in Big Man premises**?

SP8: **I don't know**

(emphasis added)

[82] In re-examination of PW8, he was asked several questions on meter tampering;

PP: Then you were asked did you inform Dato Eshwar that the supply was disconnected because they found that the meter was tampered with. Do you inform Dato Eshwar about that. Your answer was I think James informed him. Do you know what James actually inform him or not. Do you know or do not know? What is that you know that James informed him?

SP8: *James informed him that because Dato told James that the supplied cut off because of the tampering. So Dato told James, and James let me know*.

PP: Now, you also had answered the question that James was dealing with Dato Eshwar on TNB matter and I was dealing with him only on Ice Man. Can you explain a bit further what do you mean?

SP8: Ice Man because, dealing with him was because of the sales of ice Man. PP Shares la?

SP8: Yes

PP: That is what you were dealing with?

SP8: Yes

PP: Now, you were also asked did you asked there was a payment made to TNB about RM280,000. You were asked did you asked why it is fixed at RM280,000. Your answer was he showed James the figures I think everything he showed James. I think according to James, everything was there, all these figures was from TNB. Have you ever seen these figures before?

SP8: Not at all

PP: *You were asked what are these figures for Is it for tampering, monthly billing or etc. You answered it is for tampering Now how did you know that this is for the tampering*?

SP8: *Told by Eshwar*

PP: That's the only way you know is it?

SP8: Yes

PP: *Then you were asked it was suggested to you that because of this figure, the supply was disconnected. Because of tampering. You said supplied was disconnected because of tampering* but these figures are plucked from the air. Can you explain what do you mean by that?

SP8: Yes. We have never see the figures at all. Never received any claim from TNB at all. So I said it was plucked from the air

PP: It was suggested to you that you know the reconnection of the supply was done because of the agreement signed by Dato Eshwar with TNB. You said you didn't know. But what did you know at the time?

SP8: I know the payment we made, tomorrow the supply immediately comes

(emphasis added)

[83] The preliminary objection that was raised by learned counsel for the consumer was based on the rule in *Browne v. Dunn* (1893) 6 R 67, 71 per Lord Herschell LC (p. 71) which states that "it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted".

[84] We think that it is necessary to state that the so-called rule is not cast in stone and it is a rule which allowed for a measure of flexibility depending on the particular circumstances. In this regard, it is relevant for us to refer to the decision of the Court of Appeal of Singapore in *Liza Ismail v. PP* [1997] 2 SLR 454, where Yong Pung How CJ, at [67], [68] and [72] made the following observation:

[67] *The rule in Browne v. Dunn is not inflexible. This was noted in that case itself by Lord Morris in particular (at p. 79), who emphasised the need for caution against 'laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit'. Similar sentiments were expressed by Gleeson CJ in R v. Birks (1990) 19 NSWLR 677, a decision of the New South Wales Court of Criminal Appeal.*

Having set out the observations of the House of Lords in Browne v. Dunn Gleeson CJ observed (at p 688):

> *It is plain that their Lordships, whilst recognising and affirming a rule of practice in the terms in which they expressed themselves, also recognised the need for flexibility in its application. That need arises from the very nature of the subject matter which it concerns. The central purpose of the rule is to secure fairness in the conduct of adversary proceedings. That consideration provides the best guide, both to the practical requirements of the rule in a given case, and to the consequences which may properly flow from its non-observance, including the remedies that are available to deal with a problem so created.*

[68] *It is settled law then that the rule in Browne v. Dunn is a flexible rule ofpractice, intended to ensure procedural fairness in litigation. The mere failure to cross-examine does not necessarily mean that adverse inferences must be drawn against the 'defaulting' party as there may be other explanations for this failure: R v. Birks; R v. Manunta* (1989) 54 SASR 17.

...

[72] *Although the general proposition is that testimony not subjected to contradiction in cross-examination may be treated as unchallenged and thus accepted by the opposing party, the court is still entitled to reject such testimony: Paric v. John Holland Constructions Pty Ltd [1984] 2 NSWLR 505 per Samuels JA at p. 507; see also Hunt J's observations at p. 18 in Allied Pastoral Holdings. A careful evaluation of the totality of the evidence must still be undertaken to determine the cogency and weight of such testimony.*

In other words, it need not always follow that the whole of the appellant's testimony would have to be accepted by the court, nor that the conviction in respect of DAC 9796/96 would ineluctably be considered flawed.

(emphasis added)

[85] We have also taken the liberty of referring to the English Court of Appeal's decision in *Markem Corporation & Anor v. Zipher Ltd* [2005] EWCA Civ 267; [2005] RPC 31 (CA) where the case of *Browne v. Dunn* was forensically analysed and commented upon as follows:

57. Prior to the hearing before us we drew the attention of the parties to the decisions of the House of Lords in *Browne v. Dunn* (1894) 6 R 67 and the Australian case of *Allied Pastoral Holdings v. Federal Commissioner of Taxation* (1983) 44 ALR 607. One member of the court was aware that Australian practitioners were very alive to the rule in *Browne v. Dunn* (so also, he has ascertained, are Canadian practitioners). The case reference and the *Pastoral Holdings* decision were supplied to him through the helpfulness of Justice Heerey of the Australian Federal Court.

58. *Browne v. Dunne* is only reported in a very obscure set of reports. Probably for that reason it is not as well-known to practitioners here as it should be although it is cited in Halsbury for the following proposition:

Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.

59. Because the decision is so difficult to lay hands on we take the opportunity here of citing all the material passages. We do so *via* the decision of Hunt J in *Allied Pastoral* because his judgment also contains his own valuable comments. He said (p. 623):

It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. *That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play*

at the trial and which are generally regarded as being established by the decision of the House of Lords in Browne v. Dunn (1894) 6 R 67. No doubt because that decision is to be found only in an obscure series of law reports (called simply "The Reports" and published briefly between 1893 and 1895), reliance upon the rules said to be enshrined in that decision seems often to be attended more with ignorance than with understanding.

The appeal was from a defamation action brought against a solicitor and based upon a document which the defendant had drawn whereby he was to be retained by a number of local residents to have the plaintiff bound over to keep the peace because of a serious annoyance which it was alleged he had caused to those residents. Six of the nine signatories to the document gave evidence on behalf of the defendant that they had genuinely retained him as their solicitor and that the document was really intended to be what it appeared on its face to be. No suggestion was made to any of these witnesses in cross-examination that this was not the case and, so far as the conduct of the defendant's case was concerned, the genuineness of the document appeared to have been accepted.

However, the defence of qualified privilege relied upon by the defendant depended in part upon whether the retainer was in truth genuine or whether it was a sham, drawn up without any honest or legitimate object but rather for the purpose of annoyance and injury to the plaintiff. This issue was left to the jury.

The plaintiff submitted to the jury that the retainer was not genuine and was successful in obtaining a verdict in his favour. In support of that submission, the plaintiff asked the jury to disbelieve the evidence of the six signatories who had said that the retainer was a genuine one. Lord Herschell LC said (at 70-71): "Now my Lords, I cannot help saying that *it seems to me to be absolutely essential to the proper conduct of a case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit*.

My Lords, I have always understood that *if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses." His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is "perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling*".

His speech continued (at 72): "All I am saying is that it will not do to impeach the credibility of a witness upon a matter *on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted*."

Lord Halsbury said (at 76-77): "My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

Lord Morris (at 77-79) said that he entirely concurred with the two speeches which preceded his, *although he wished (at 79) to guard himself with respect to laying down any hard-and-fast rules as regards cross-examining a witness as a necessary preliminary to impeaching his credit*. The fourth member of the House of Lords, Lord Bowen, is reported (at 79-80) to have said that, on the evidence of the six signatories, it was impossible to deny that there had been a real and genuine employment of the defendant. But his Lordship made no statement of general principle. These statements by the House of Lords led to the formulation of a number of so-called "rules". They have been stated in various ways in the cases and by text-book writers, and it is fair to say that there is some room for debate as to their correct formulation. For example, in *Cross on Evidence* (second Australian ed, 1979) the authors state (at para 10.50): "*Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence in chief*."

In *Phipson* (12th ed, 1976) the authors state the rule somewhat more discursively (at para 1593): "*As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share* ... If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account and he will not be allowed to attack it in his closing speech, nor will he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point ...

Where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit. Failure to cross-examine, however, will not always amount to an acceptance of the witness's

testimony, eg, if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character."

60. Hunt J concluded (p. 634):

> I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings.

61. We think all that applies here. It is not necessary to explore the limits of the rule in *Browne v. Dunn* for this case falls squarely within it. Indeed the position is stronger here, for the judge was not even asked to disbelieve the witnesses. Mr Watson was right not to support the judge's findings – the only puzzle is why he did not take that position earlier. (emphasis added)

[86] In conclusion on meter tampering, it is our view that the preliminary objection was misguided and ought not to have been raised. Indeed, there was no attempt by TNB to discredit the consumer's witness on the issue of meter tampering. And from a plain reading of the notes of evidence, it is clear that the consumer had fair notice of the fact that TNB had made discovery of meter tampering and all relevant documentary evidence in relation to the issue (placed in Part B no less) were given to the consumer ahead of the trial. More importantly, there was no attempt and no ruling by the court, to discredit or debunk the contemporaneous TNB documents (and police reports *etc*.) in relation to meter tampering.

[87] It was therefore incumbent upon the learned judge to have examined all the evidence that was adduced and to determine whether there was tampering. Had he done so, it would have been plain beyond peradventure that there was no dispute that there was meter tampering, except that the perpetrator was unknown. Indeed, TNB never claimed that the consumer was responsible for meter tampering. And, significantly the consumer also did not tender any evidence to debunk TNB's subjective finding of meter tampering.

[88] At the end of the day, it was plain and obvious that there was copious documentary proof (where most of the relevant documents on meter tampering were in Part B) and supported by oral testimony of TNB's technical inspection team that they found that the TNB meter had been tampered. Our reading of the evidence suggests quite unequivocally that TNB's evidence on meter tampering is unimpeachable as it was contemporaneous, credible, cogent and convincing.

[89] As a result, the learned judge ought to have found that the evidence on meter tampering was not discredited or impugned in any way. The preliminary objection was premised on the basis that TNB was blaming the consumer for the meter tampering which was not really the case that was presented at the trial. In the circumstances, the learned judge was plainly wrong in his decision to uphold the preliminary objection and to hold that TNB had abandoned the issue of meter tampering.

The Mayaria Issue – Repeated Meter Tampering

[90] Next, we deal with the *Mayaria* issue with specific reference to repeated meter tampering. Before we deal with *Mayaria*, it is necessary to highlight the rectification work which was carried out after discovery of meter tampering. The following table explains the rectification which had been carried out.

No.	Date of Inspection	Rectification taken based on TNB's contemporaneous documents
1.	04.12.2013 (MSB 1)	Pepasangan disil semula.
2.	04.12.2013 (MSB 2)	Pepasangan disil semula.
3.	06.05.2014 (MSB 1)	Tukar armoured cable. Tukar CT ketiga-tiga fasa kerana CT telah terbakar. Note: Inspection was conducted on 06.05.2014 but rectification was carried out on 10.05.2014. Note: This inspection was the basis of TNB's First disconnection from 02.07.2014 until 01.10.2014.
4.	06.05.2014 (MSB 2)	Tukar armoured cable. Note: Inspection was conducted on 06.05.2014 but rectification was carried out on 10.05.2014. Note: This inspection was the basis of TNB's First disconnection from 02.07.2014 until 01.10.2014.
5.	15.10.2014 (MSB 1)	Tukar meter main. Pendawaian diperbetulkan dan pepasangan disil semula. Note: This inspection was the basis of TNB's Second disconnection from 08.04.2015 until 14.05.2015.
6.	07.01.2015 (MSB 2)	Tukar meter baru pada meter utama & meter semak. Pepasangan disil semula. Note: This inspection was the basis of TNB's Second disconnection from 08.04.2015 until 14.05.2015.

[91] TNB contends that they did not fall foul of the *Mayaria* principle as they fall within the "exceptions". As far as we are concerned, there are no exceptions to the *Mayaria* principle. The answer to the issue of repeated meter tampering is in fact to be found in para. [37] of the Federal Court's judgment, in *Chew Thai Kay* where the Federal Court reiterated the principle that the amendment to s. 38(1) of the Act had not altered the position of the law as decided by the Federal Court in *Mayaria* when it affirmed the decision of the Court of Appeal in that case. The Federal Court held that the position of the law now, as then, was that once the impugned meter had been rectified and/or replaced with a new meter and TNB no longer suffered loss, TNB could not lawfully invoke the amended s. 38(1) to disconnect electricity to the consumer's premises. The Federal Court went on to state that it was clear and plain from a reading of s. 38(1) that only on a finding of evidence of meter tampering was TNB empowered to disconnect supply. If there was no evidence of meter tampering, no offence was committed and there was no lawful power to disconnect.

[92] According to the Federal Court, Parliament intended for the subsequent action (disconnection) to be taken presently, urgently, and expeditiously (*ie*, immediately upon discovery of tampering) and not in the future (*ie*, long after discovery of any tampering, much less after the tampered meter had been rectified and/or replaced). Only evidence of meter tampering justified disconnection. Once the impugned meter had been rectified there was no longer any issue of meter tampering and thus the offence under s. 37(1) no longer existed. There had to be a continuing offence to invoke the power of disconnection.

[93] Thus, it is clear from the judgment of the Federal Court in *Chew Thai Kay* at [37] that "where there was a further discovery of meter tampering after the previous tampering had been rectified, TNB could immediately exercise the power of disconnection under s. 38(1) provided that it took no step to all over again rectify the subsequent tampering". This passage from the apex court is decisive on the issue of repeated meter tampering. In the upshot, it is not a question of exception to *Mayaria*. Rather, *Mayaria* still applies and each time the tampering is repeated, it becomes necessary for TNB to comply with s. 38(1) of the Act and to then issue the requisite notice of disconnection. If TNB rectifies the tampered meter, then it falls into the ambit of the *Mayaria* principle and cannot thereafter invoke the statutory power of disconnection under s. 38(1) of the Act. As such, the disconnections were wrongful and TNB was liable for damages. The consumer claimed special damages which had to be strictly proven.

Damages

[94] We turn now to damages. It is appropriate at the outset to set out the trite principles in relation to proof of damage. Here, it is important to note that the main focus of the present discussion is the hefty amount claimed as special damages, which must be specifically pleaded and strictly proven. In *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19; [1993] 3 MLJ 352, Edgar Joseph Jr SCJ said at pp. 57 and 58 (CLJ); p. 416 (MLJ):

> Now, those being my findings of fact on the issue of liability, and they are findings in favour of the plaintiffs in respect of both trespass and nuisance, I must now address the question of the quantum of damages.
>
> The general rule as to the measure of damages, a rule equally applicable to tort as to contract, was defined by Lord Blackburn in *Livingstone v. Rawyards Coal Co* 82, at p. 39 in these terms:
>
> > that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.
>
> In *Munnelly v. Calco* 83, Henchy J said, at p 399:
>
> > ... the particular measure of damages allowed should be objectively chosen by the court as being that of the particular case, to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, so far as pecuniary awards can do so.
>
> Before I proceed to assess the quantum of damages, I would remind myself of certain other well-established principles which I should keep in the forefront of my mind in considering this part of the case.
>
> First, when a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable.
>
> Secondly, I would refer to what Lord Goddard said in *Bonham-Carter v. Hyde Park Hotel Ltd* 84, at p 178:
>
> > plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: '**This is what I have lost; I ask you to give me these damages.' They have to prove it**.
>
> Thirdly, on the quality of evidence expected of a plaintiff, it is necessary to remember what Devlin J (as he then was) said in *Biggin & Co v. Permanite* 85, at p 438, namely, that where precise evidence is obtainable, the court naturally expects to have it; where it is not, the court must do the best

A it can. Nevertheless, it remains true to say that that generally, **difficulty of proof does not dispense with the necessity for proof**. (See *Aerial Advertising Co v. Batchelors Peas (Manchester)* 86 at p 796 per Atkinson J)

The case of *Ashcroft v. Curtin* 87 illustrates this point, for there the plaintiff, B claiming for diminution of profits of his one-man business, failed in his claim despite the evidence pointing to a decrease in the company's profitability due to the injury, the records relied on being too rudimentary and the accounts too unreliable to quantify the loss.

(emphasis added)

C **[95]** Before us, it was argued for TNB that the claim for special damages should fail on the following grounds. In summary, TNB's complaint on special damages was as follows:

Exhibits P8 to P18, and P20 to P22 are simply payment vouchers and invoices in respect of the consumer's purported purchases of diesel for its D generators. There is however no evidence that the consumer had in fact made the payments stated therein as no receipts in respect of the purported payments were adduced.

The respondent's purported dealers for the purchase of diesel also did not give evidence at trial.

E The High Court had also failed to give due consideration to the fact that the diesel purportedly purchased by the consumer (per the adduced payment vouchers and invoices) were not only for the use of the generators but also for the use of the consumer's lorries.

More importantly, the High Court failed to give due consideration to the F fact that some of these documents are *Ice Man Sdn Bhd documents and not the consumer's documents*.

Exhibits P1 to P3, and *P2* are simply payment vouchers and invoices in respect of the consumer's rental and purchase of the generators from PW2. There is however no evidence that the consumer had in fact made the payments stated therein as no receipts and consumer's account G statements in respect of the purported payments were adduced. *This was admitted by PW2*.

Again, the High Court also failed to give due consideration to the fact that Exhibits *P1, P2 and P3* also consists of Ice Man Sdn Bhd documents.

(emphasis added)

H **[96]** The following cases illustrate the point as to the quality of evidence necessary to justify a claim for special damages. In particular, the cases emphasise that there must be evidence of a credible paper trail to show that payment was made. Indeed, invoice/vouchers *per se* without receipts, will not suffice. The first case is the Court of Appeal's decision in *Tan Ah Kow* I *& Anor v. Tan Chaui En* [2018] 2 CLJ 610; [2017] 6 MLJ 297 where the following principles were enunciated:

[24] The learned JC erred by not considering the fact that the bank statements exhibited by the respondent are actually not the bank statements of the respondent personally, but of the respondent's business enterprise, namely Lee Hin Motor Auto Parts Enterprise (RR Bhg C Jld 4/4 pp 357, 359-360, 370, 373 and 376-377). Therefore, the bank statements do not reflect the respondent's personal bank transactions. Nowhere in the bank statements is it stated that the cheque payments by Lee Hin Motor Auto Parts Enterprise are paid to the first appellant for the respondent's purchase of the 13 pieces of land.

[25] The respondent exhibited some invoices to prove his payments to the first appellant ('exhs. P2(a)-P31') for the purchase of the 13 pieces of land. The respondent contended that he had also paid the first appellant for the said purchase by way of contra with the sale of motorcycles by the respondent to the first appellant. However, the learned JC failed to consider that the **invoices by themselves do not prove payment of the purchase price** to the first appellant. **In commercial transactions, invoices are billing documents, but they are not receipts and thus cannot be used as proof of payment**.

[26] The respondent did not produce any other contemporaneous documents to support his claim based on the invoices. There is no proof of any purchase order given by the first appellant to the respondent. The first appellant denied having received any motorcycles by way of contra from the respondent. The learned JC further failed to take note of the fact that there were no delivery orders produced by the respondent to show that the first appellant had taken delivery of the motorcycles from the respondent. Thus, it is clear that the respondent was **unable to prove his payment** to the first appellant by contra with the motorcycles as he had pleaded in the seven items stated as 'invois' in the above table in para 8 of the SOC.

[27] There is therefore no proof at all by the respondent that from 27 February 2003 - 10 March 2004 he had paid RM200,000, and from 24 March 2005 - 5 July 2005 he had paid RM50,000 in the form of cheques, and RM170,000 in the form of contra with motorcycles supplied to the first appellant for the purchase price of the 13 pieces of land.

[28] We agree with the submission of learned counsel for the appellants that the unilateral documents of the respondent purporting to show payments are of no probative value to prove actual payment by him of the purchase price.

(emphasis added)

[97] In *Sunlite Textile Sdn Bhd v. Motilal Realty Sdn Bhd (No 2)* [2007] CLJU 187; [2007] 1 LNS 187; [2007] 5 MLJ 640, Abdul Malik Ishak J rendered a comprehensive analysis on the law relation to proof of damages. At para. [26] he said:

Invoices Without Receipts

[26] The plaintiff's affidavit in support in encl. 2 asserted at para. 11 to the following effect: that 'the contractor's invoice and receipt for the sum

of RM394,000 which are annexed hereto and marked as exh. 'RKB-3'.' The Malay language version of the same paragraph of the same affidavit was worded in this way:

> Sekarang dilampirkan dan ditunjukkan kepada saya adalah invois-invois dan resit-resit untuk jumlah RM394,000 yang ditandakan sebagai eksibit 'RKB-3'.

A perusal of exh 'RKB-3' of encl 2 would indicate that *only the invoices were exhibited. No receipts were exhibited at all. In fact, there was no evidence that the plaintiff had made any payment. It can therefore be concluded that the plaintiff's averments that payments were made based on the receipts were both misleading and deceptive*.

(emphasis added)

[98] Having examined the documents carefully and comprehensively, we are constrained to agree with the submissions that were made on behalf of TNB in that there is no evidence whatsoever of the purported damages that the consumer had incurred from paying Ice Man per exh. P19. In this regard, there is no evidence of the losses suffered by Ice Man which the consumer was liable to compensate. And as rightly submitted on behalf of TNB, there is in fact no evidence that the consumer had ever used generators (and diesel) for purposes of the ice production business at the premises. As mentioned at the outset, the consumer only provided management services and were not running an ice-factory.

[99] In this regard, there is also no evidence whatsoever of the consumer's business sales during the period of electricity disconnection to justify the purported rental and/or purchase of the generators.

[100] No doubt, there appear to be various receipts issued by Ice Man for the compensation payments that were made by the consumer. It is therefore tempting to conclude that the consumer had proven at least the payment of RM1,536,225 to Ice Man. But the problem here is that PW8 was cross-examined extensively on this and he could not show proof of actual payment. All he could say was that he made the payment in Singapore through a "money-changer" and it was through the money changer that payment was made to Ice Man. It is important to keep in mind that Ice Man and the consumer are closely connected. The answers given by PW8 just did not stand up to curial scrutiny and was questionable in our view. In the overall analysis, it is quite clear that the consumer was not able to show any evidence of actual payment to Ice Man, or to Kuang Yi Machinery Trading (rental/purchase of generators) or to Lim Soon Kit (purchase of diesel), or to Teo Choo Peow (purchase of diesel). In the overall analysis, we find it quite remarkable that the consumer could not even show any credible evidence of actual payments by them to Ice Man, or to the so-called suppliers of diesel and generator.

Can Exemplary Damages Be Allowed For A Claim Which Is Based On Breach Of Contract?

[101] It was argued for TNB that exemplary damages ought not to have been granted as the consumer did not plead specific facts to justify a claim for exemplary damages.

[102] Reference was made to the Court of Appeal's decision in *Kuan Pek Seng v. Robert Doran & Ors And Other Appeals* [2012] CLJU 775; [2012] 1 LNS 775; [2013] 2 MLJ 174. In the present case, we agree that exemplary damages ought not to have been granted but for a different reason. It is necessary to state here that the following aspect of exemplary damages was not raised by either side but being an issue of law, we consider it necessary and imperative that it be dealt with here. In our view, the claim for exemplary damages was untenable.

[103] The issue as to whether exemplary damages can be allowed for a claim which is based on a breach of contract was comprehensively discussed in the recent decision of the Court of Appeal in *National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Bhd* [2023] 10 CLJ 430; [2023] 7 AMR 213 ("*National Feedlot*"). The following extracts from that judgment (reproduced below) explain why exemplary damages are not allowed in breach of contract claims.

> [119] And as for whether aggravated and exemplary damages are claimable in a breach of contract case, it is relevant to refer to the judgment of Lee Swee Seng Judicial Commissioner (as he then was - now JCA) in *Ang Beng Choo v. RHB Insurance Berhad* [2013] 1 LNS 382 where the learned judge said:
>
> Damages
>
> Whether aggravated and exemplary damages are claimable for breach of contract
>
> The basis for assessment of damages in a breach of contract is to put the plaintiff, the non-defaulting party, in the position as if the contract has not been wrongfully terminated. It is compensatory in nature. As such aggravated damages is generally not awarded for a breach of contract *simpliciter*. In this respect the House of Lords decision in *Farley v. Skinner* [2002] 2 A.C. 732 summarised succinctly the general principle in a breach of contract against an award for anxiety, distress, disappointment and loss of credibility, reputation and the like as follows in the speech of Lord Hitton at page 757-758:
>
> > 47. It is clearly established as a general rule that where there has been a breach of contract damages cannot be awarded for the vexation or anxiety or aggravation or similar states of mind resulting from the breach. The principle was stated by Bingham LJ in *Watts v. Morrow* [1991] 1 WLR 1421, 1445:

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

This general principle has recently been approved by this House in *Johnson v. Gore Wood & Co* [2002] 2 AC 1. The principle has particular application to commercial cases and in *Johnson v. Gore Wood & Co* Lord Cooke of Thorndon observed, at p 49, that: "Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude."

But the principle is not applicable in every case and in *Watts v. Morrow* [1991] 1 WLR 1421 Bingham LJ went on to state that there was an exceptional category of cases which he described as follows:

> Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

Bingham LJ then stated:

> In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. (emphasis added)

The exceptions do not apply in this case for a breach of an Agency Agreement.

Generally no exemplary damages shall be awarded in a contractual claim, and the weight of authorities is against granting such an award. The learned author of *Guest on Contract* (28th ed) is categorical on this ("vindictive" or "exemplary" damages have no place in the law of contract"; pg. 592), while *Mcgregor on Damages* (18th ed) has this to tell us at page 428:

> For contract, on the other hand, the position is less certain. Historically, the law has always set its face against awarding exemplary damages for breach of contract; outrageous conduct is the domain of tort rather than contract.

Even when the Supreme Court of Canada in *Royal Bank of Canada v. W. Got & Associates Electric Ltd Et al* 178 D.L.R. (4th) 385, approved and awarded exemplary damages in a breach of contract claim it cautiously observed as follows at page 394-395 that such an award would be most exceptional and extraordinary:

> The trial judge and the Court of Appeal awarded exemplary damages for the egregious conduct of the bank and we would not disturb this finding. Punitive damages are available for breach of contract, although, as Mclntyre J. held in *Vorvis v. Insurance Corp. of British Columbia,* [1989] 1 SCR 1085 ..., the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare ...

We emphasize ... that an award for exemplary damages in commercial disputes will remain an extraordinary remedy.

The celebrated author Visu Sinnadurai in the *Law of Contract* (3rd ed) was of the same view too at page 731, para 13.38, Vol 1):

> It is only in extremely rare cases that the courts grant exemplary damages. This type of damages if granted, is usually to punish the Defendant. Under English law, the only category of contracts in which such damages had been granted were in actions for breach of promise of marriage. But since the abolition of such actions in 1970 by the Law Reform (Miscellaneous Provisions) Act 1970, it would appear that exemplary damages will no longer be granted by the English courts for any action for breach of contract. Since the decision of the House of Lords in *Rookes v. Barnard*, even the award of such damages in tort is now restricted.

Even in a breach of contract of employment generally no aggravated and exemplary damages are awarded. In *Penang Port Commission v. Kanawangi s/o Seperumaniam* [2002] 8 CLJ 503; [1996] 3 MLJ 427 at pages 434-435, His Lordship Mahadev Shankar JCA observed:

> There are other very disturbing features about this litigation. *Addis v. Gramophone Co Ltd* [1909] AC 488 is well-entrenched in the common law, and damages cannot be awarded for the manner of the dismissal of his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. We are at a total loss to understand on what basis the deputy registrar thought fit to award a huge round sum of RM2m under this head.

The respondent refused to turn up for work on 1 March 1985 claiming that he had been constructively dismissed. It is far from clear whether the deputy registrar considered the respondent's duty to mitigate his damage. Furthermore, the respondent claimed that he was entitled to be confirmed as traffic supervisor because he thought he was qualified for the post. The undeniable fact is that he was never appointed to that post by the appointing authority.

The basis on which the deputy registrar proceeded to calculate the alleged 'arrears' of emoluments due to the respondent from 1 March 1985 (as also the award of RM2m) would have been an unsolved mystery, at least until the deputy registrar's notes of evidence and grounds of judgment became

available. Damages are not awarded simply because the plaintiff has thrown them at the head of the court. The loss must be shown to have actually occurred and also be recoverable in law before the award can be made.

See also the helpful article "*Exemplary Damages for Tort and Breach of Contract in Selected Common Law Jurisdictions*" by Abdul Majid bin Nabi Baksh [2007] 3 MLJ xcvii.

[120] In *PH Hydraulics & Engineering Pte Ltd v. Airtrust (Hong Kong) Ltd And Another Appeal* [2017] SGCA 26; [2017] 2 SLR 129, the Singapore Court of Appeal (per Justice Andrew Phang) unequivocally enunciated that punitive damages are not claimable in breach of contract claims. The learned judge gave a number of reasons why punitive damages are not claimable in a breach of contract situation. They may be stated as follows:

> (f) In so far as the issue relating to the possible award of punitive damages in a purely contractual context was concerned (and considering, first, the arguments against the award of such damages), allowing the courts to punish a party who had breached a contract sat uneasily with the concept of a contract as an obligation arising from a voluntary and binding agreement. The courts ought to have but a minimal role in regulating the contracting parties' conduct without regard to their agreement. It would be anomalous or even inappropriate for the court to regulate the contracting parties' conduct by imposing an award of punitive damages on the party in breach by way of what is in effect an external standard. The standard was an external one because, with the award of such damages, the court went further to signify its own outrage at the contract-breaker's conduct, and to communicate its own view of what proper commercial behaviour should be. Such an external standard might be said to be antithetical to the very nature and function of the law of contract in general and its remedial structure in particular.
>
> In contrast, the law of tort afforded far more latitude to the courts in regulating conduct between the parties; it imposed standards of normative behaviour between complete strangers: at [68], [71], [72] and [74].
>
> (g) The argument based on a "remedial gap" - that it was necessary to have a residual discretion to award punitive damages in contract law because existing remedies were inadequate to punish and deter outrageous behaviour – was neutral at best. If the concepts of punishment and deterrence were inapposite in the context of the common law of contract, there would be no gap in the first place. Such a gap could, in any event, be filled by alternative remedial options, such as "Wrotham Park damages", an account of profits for breach of contract, or damages for mental distress. These arguably had punitive or deterrent effects even though they remained primarily compensatory in purpose in that they protected a plaintiff's interest in contractual performance: at [78] to [84].

(h) Another argument against recognising punitive damages for breach of contract was the absence of clear criteria by which to determine when punitive damages should be awarded, and the consequent uncertainty this would lead to. The concept of an "outrageous" breach was particularly elusive in the commercial context where self-serving behaviour was an accepted facet of contracting norms. It would be very difficult to identify specific (as well as workable) criteria for ascertaining when a contracting party's conduct had crossed the line from self or vested interest into the realm of the "outrageous": at [85], [86] and [89].

(i) The weight of case law authority was also against the recognition of punitive damages for breach of contract though this was not necessarily conclusive of the issue: at [101].

(j) Policy considerations also militated against the award of punitive damages in a purely contractual context. Awarding punitive damages in a purely contractual context might adversely affect the manner in which litigation would be conducted inasmuch as it might add to its length, complexity and costs and confer upon plaintiffs an undue advantage in forcing large (or larger) settlements. Further, punitive damages were most commonly awarded in circumstances where there was a heightened risk of recurrent reprehensible conduct, especially where the parties were of unequal bargaining power, such as in insurance, employment and consumer transactions. Such risk would be more appropriately managed by regulation rather than by judicial remedies such as an award of punitive damages: at [102], [104] and [106].

(k) Turning to the arguments in favour of an award of punitive damages in a purely contractual context, first, the argument from uniformity – that it would be inconsistent to recognise punitive damages in tort but exclude punitive damages from contract claims – was unpersuasive because the law of tort was qualitatively different from the law of contract: at [110] and [111].

(l) The Canadian case of *Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257 ("Whiten"), the key authority relied on by the judge, was not persuasive authority for the availability of punitive damages for breach of contract. *Whiten* held that punitive damages could be awarded where the conduct complained of constituted the breach of an independently actionable wrong – the breach of a contractual duty of good faith. But there was no reason in principle why a single breach of contract ought not also to justify an award of punitive damages; if it was the egregious nature of the conduct of the party in breach that was being punished, it ought not to matter whether that conduct was the result of a single breach or more than a single breach: at [112], [114], and [115].

(m) As the *amicus curiae* had also pointed out, *Whiten* has been subject to no small measure of criticism (significantly, from a number of eminent academic experts in the field of Canadian contract law, one of whom was of the view that *Whiten* may not be a true authority for the award of punitive damages in a purely contractual context as there were features of the case not common to ordinary commercial contracts, such as *quasi* – regulatory interests, and as it was also a case involving tortious defamatory conduct): at [117] and [118].

(n) The principles in *Whiten* were also not persuasive because the court assumed that there was no difference in principle between awarding punitive damages in tort and in a purely contractual context; the broader issue of principle – why punishment was a legitimate remedial response to a breach of contract – was not really dealt with. The principle of proportionality, which attempted to impose a rational limit on punitive damages awards, did not furnish sufficient guidance and had led in turn to uncertainty: at [121] to [123], and [126].

(o) Further, it was not clear whether Whiten recognised the availability of punitive damages for all contract breaches or only certain types of contracts where was a material power imbalance, or more generally contracts where there was a duty of good faith: at [127] and [128].

(p) The existence of a duty of good faith would not, on its own, justify an award of punitive damages in the event of its breach, although it might help overcome one of the objections in principle to punitive damages for breach of contract: the undesirability of a court imposing on the parties its own normative standard of contractual performance. However, it did not necessarily follow that punitive damages ought to be awarded; the existence of an express or implied duty of good faith was a neutral factor: at [134].

(q) The arguments against the award of punitive damages far outweighed the arguments in favour of such an award. There ought to be a general rule that punitive damages could not be awarded for breach of contract: at [135].

(r) Given that PH had at most been grossly negligent, this was not a situation which merited an award of punitive damages. Even if fraud had been established, this was hardly an exceptional case warranting a departure from the general rule: at [138] and [139].

(s) Cl 25 excluded consequential and indirect losses suffered by the contracting parties as well as third parties arising out of the (defective) performance of the SPA in question, but not consequential or indirect losses arising from a refusal to perform the contract or to be bound by it. Airtrust's claims for loss of profit and the loss of opportunity for earning further profits were consequential and indirect losses and therefore excluded by Cl 25: at [151], [153], [155] and [156].

(t) Airtrust sought indemnity costs in respect of the entire trial. The specific instances of unreasonable conduct it had alleged, even if made out, only affected a few of the issues in dispute and a few witnesses. There was no reason to disturb the judge's decision not to order an award of indemnity costs against PH: at [158].

[Observation: Given that the instances in which a breach of contract can occur were manifold, the court would not rule out entirely the possibility that a case might one day come before the court, involving a particularly outrageous type of breach, which necessitated a departure from the general rule that punitive damages would not be awarded for breach of contract. That said, any argument for the award of such damages would need to surmount the many reasons of principle and policy set out in the judgment against doing so. It would therefore take a truly exceptional case to persuade the court that punitive damages should be awarded for breach of contract. Indeed, the court was not sure that it would award such damages even if it were faced with the facts of a case as extreme as *Whiten*. There were a number of other possible alternative remedies (including the award of damages for mental distress for breach of contract) that could also be invoked by the court to do practical justice while respecting the compensatory function of damages for breach of contract: at [136].]

[104] Thus, it is clear that it is not permissible for exemplary damages to be granted for a breach of contract claim of this type. Quite apart from the lack of jurisprudential basis for awarding exemplary damages for a breach of contract claim, we also note that the learned judge had awarded exemplary damages based on 25% of the special damages. This is quite unprecedented. Special damages are out of pocket expenses or claims which are quantifiable and which have to be specifically pleaded and strictly proven. Special damages are not assessed. They need to be proven in the usual way before the judge. The claimant must produce the best evidence to support the claim for special damages. Traditionally, exemplary damages are awarded in addition to the general damages.

[105] As stated earlier, we are satisfied that the consumer had not proven their special damages claim. Even if we were to accept the suggestion that the consumer had proven the amount claimed as special damages, we do not agree that exemplary damages can be granted as a percentage of special damages. There is no jurisprudential support for exemplary damages to be granted as a percentage of special damages. In any event, we are of the view that as a matter of law, exemplary damages are not claimable in a breach of contract claim. (See the views of this court in the *National Feedlot* case – *supra*).

Breach Of Statutory Duty – Whether The Defendant Had Infringed The *Consumer's Rights As A Registered Electricity User By Divulging The Consumer's Account Details To A Third Party Without The Consumer's Consent*

[106] On the issue of breach of statutory duty, (per paras. [104] and [105] of the amended statement of claim), it is clear that those paragraphs do not specify which sections of the Act have been breached. In *Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors* [1999] 8 CLJ 131; [1997] 3 MLJ 546 (HC) p. 153 (CLJ); pp. 566 to 567 (MLJ), the High Court (per Justice James Foong – later FCJ) said:

> *Unlike the general principles of pleading where laws need not be pleaded, in an action based on a breach of statutory duty, it is absolutely necessary and essential for the plaintiffs to disclose the specific legislation affected; for it is the basis for the plaintiffs' claim*. In fact, this is the approach recommended in the *Atkin Court Forms*, where all the precedents covering this aspect of the claim fully disclose the relevant provision of the statute or by-laws alleged to be breached. (emphasis added)

[107] Thus, the consumer's claim for alleged breach of statutory duties (wrongful disclosure of the consumer's information to third parties without their consent) was a complete non-starter and ought to have been dismissed. But, it seems that the claim has since morphed into a claim for damages for breach of confidential information, which was not at all pleaded. In *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644; [2014] 5 MLJ 1, the Court of Appeal dealt with the importance of pleadings in a breach of confidence claim and stated as follows:

> [32] To trigger cl. 7 of the 'memorandum' it is essential to disclose by way of pleadings what 'information' which was disclosed was breached. We have perused the pleadings several times but we were not able to identify the precise 'information' which was said to be breached. The word 'information' has a specific meaning and jurisprudence. All statements or correspondence made by the plaintiff will not qualify as 'information'. Neither will a part of the proposal *per se* will qualify as information. In addition, 'information' *per se* will not be entitled to 'confidential' status in relation to the memorandum. The statement of claim should define with some precision the information or communication which is alleged to be confidential. (See *Diamond Stylus Co Ltd v. Bauden Precision Diamonds Ltd* [1972] FSR 177).
>
> The usual form of relief in an action for breach of confidential information includes a declaration as to the confidentiality. (See *Industrial Furnaces v. Reaves* [1970] RPC 605). In essence, the trial court must first identify the 'information' which has the characteristic of confidentiality and then proceed to consider whether the exception stated in cl. 7 will apply and then proceed to consider whether there was a breach. We have perused the judgment of the learned trial judge several times but we were not able to identify the finding on the 'information', whether it had the

characteristic of confidentiality and whether it was breached. Failure to do so will necessarily compromise the integrity of the decision making process and the judgment will stand as perverse. All subsequent findings resulting from the failure will have no value to the decision making process itself. In *Ocular Sciences Ltd v. Aspect Vision Care Ltd* [1997] RPC 289 the court had this to say:

> Breach of confidence
>
> (1) It was essential in a breach of confidence action that the plaintiff should give full and proper particulars of all the confidential information on which he intended to rely for two reasons: first, the plaintiff usually sought an injunction and, unless the confidential information was properly identified, an injunction would be of uncertain scope and might be difficult to enforce; secondly, the defendant must know what case he had to meet as he might wish to show that certain of the items relied on were matters of public knowledge. The absence of proper particulars could compromise a defendant's ability to defend himself if the plaintiff could rely on matters of which no proper warning was given. If the plaintiff failed to give proper particulars it was open to the court to infer that the purpose of the litigation was harassment rather than protection of the plaintiffs rights and the action could be struck out as an abuse of process.

[108] Hence, on the pleadings point alone, the claim for wrongful disclosure of the consumer's information to third parties (breach of statutory duty) or even breach of confidence, ought to have been dismissed.

Defamation – Did DW19 Utter The Impugned Words?

[109] Next, we deal with the claim for defamation. Of course, the learned judge was right that based on paras. [39] and [45] of the defence, there was an admission that the impugned words were uttered by DW19. But the oral testimony was otherwise. Here, it is relevant to refer to PW5's evidence and DW19's evidence in response. In this regard, it is clear that the learned judge completely ignored the evidence of DW19 that he never said the impugned words as conveyed by PW5. And, more pertinently, DW19's evidence was unchallenged during cross-examination. PW5 admitted that the impugned statement in her letter of 8 May 2015, was her own words and not those uttered by DW19. Under cross-examination PW5 explained exactly what was said by DW19.

> PD: ... Dinyatakan di dalam pliding ini, En Fauzi ada buat representasi kepada Puan Azah. Kita baca line yang ke 4 lah. Dari atas. Merupakan satu kesalahan yang berat kerana mereka telah melakukan kesalahan yang berat kerana mereka telah berkali-kali mengubahsuai meter meter TNB. Soalan saya, apa yang En. Fauzi, adakaha ini yang En. Fauzi cakan pada Puan Azah atau ini dalam bentuk document? Boleh ceritakan tidak?

SP5: Bukan dokumen. Masa mesyuarat kami telah dimaklumkan oleh En. Fauzi bahawa kilang ais tersebut di cakap ada kes dan ada dua meter dan kami dimaklumkan bahawa memang kedua-dua meter tersebut ada meter tampering yang berlaku. Banyak kali dia cakap. So dia cakap memang ada kes berkenaan dengan meter tampering. Sebab tu dia cakap problem untuk anakguam kami lah untuk membeli sebab meter tampering telah berlaku banyak kali. Sebab itu tunggakan yang ada pada akaun tinggi, the amount itu adalah tinggi. Itu yang diamklumkan.

[110] We are thus constrained to hold that despite paras. [39] and [45] of TNB's defence, it is of critical importance that the person to whom the impugned words (PW5) were alleged to have been said had clearly testified that the words she used were her words and not that of DW19. In light of PW5's evidence, the claim for slander cannot stand as it has not been proven that the impugned words per para. [56] of the amended statement of claim were uttered by DW19. The claim for defamation ought to have been dismissed. In any event, even if defamation has been proven, it is necessary to keep in mind that the impugned words, if they were indeed uttered, were only said to one person. The extent of publication was *de minimis* at best and the consumer would have been entitled to a meagre amount of damages not exceeding RM1,000. Further, there was no plea for aggravated damages. Thus, we do not see how the learned judge could have granted aggravated damages when there was no claim for this head of damages.

[111] The case that is relevant on limited publication and its effect on damages is the Singapore Court of Appeal's decision in *A Balakrishnan & Ors v. Nirumalan K Pillay & Ors* [1999] 3 SLR 22 (SGCA) which reads as follows:

[48] There was also a point of distinction which, with respect, we think that the learned judge did not take into account. In the three cases referred to as guiding precedents, the publication of the defamatory matter was in the press. The extent of publication was much greater than that of the present case. The circulation of *The Hammer* is limited by the fact that it is not sold on the newsstands. Out of the 20,000 copies which were printed, only 8,000 copies were sold in various parts of Singapore and only Tamil readers would have read it. Also, not all the Tamil readers of the article in August 1995 would at that time still be familiar with the persons who held responsibilities in the 1995 Tamil Language Week.

The actual extent of publication of the article was very limited and very much less than that of the three cases referred to by the learned judge. Admittedly, the gravity of defamation cannot always be ascertained by reference to the extent of the publication; nor can it be varied or adjusted by some direct proportion to the number of persons to whom the defamatory material is published. Nonetheless, the extent of publication remains an important factor which should be considered in the assessment of damages: see *Tang Liang Hong v. Lee Kuan Yew & Anor* [1998] 1 SLR 97 158.

(emphasis added)

The Outcome

[112] To sum up, we agree with TNB that the preliminary objection ought to have been dismissed. Further, the learned judge ought to have examined all the evidence. And if that had been done, the learned judge would have come to the inescapable conclusion that there was meter tampering on the dates when inspections were carried out by TNB's technical team. However, we find TNB's stand on the *Mayaria* issue, untenable. Thus, since the tampered meters were rectified, they could not lawfully disconnect the supply of electricity under s. 38(1) of the Act. Thus, they are liable to pay damages for wrongful disconnection of electricity to the premises.

[113] However, the consumer failed to prove their claim for special damages. The claim for trespass is no longer legally sustainable or tenable. There was no appeal by the consumer arising out of the dismissal of their claim for the tort interference with their business. The claim for defamation is unmaintainable in light of PW5's testimony, and DW19's evidence that he did not utter the impugned words. Lastly, the claim for breach of statutory duty is untenable as the relevant statutory provisions alleged to have been breached and which purportedly gave rise to a private cause of action, was not specifically pleaded.

[114] As for breach of confidence, the consumer did not even plead the elements necessary for a claim for breach of confidence. TNB has failed on the *Mayaria* issue, but has succeeded on all other issue both on liability and quantum. The final outcome is that TNB's appeal succeeds and is hereby allowed. The High Court's order/judgment dated 30 September 2019 is hereby set aside. We allow costs of RM80,000 (subject to allocatur) as costs here and below, to be paid by the consumer (respondent) to TNB (appellant).